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Supreme Court, U.S.
FILED
07-919 JAN 10 2008
OFFICE OF THE CLERK

No.

# In the Supreme Court of the United States

AMERICAN ISUZU MOTORS INC., BANK OF AMERICA, N.A., BARCLAYS BANK PLC, BRISTOL-MYERS SQUIBB COMPANY, BP P.L.C., CHEVRONTEXACO CORPORATION, *ET AL.*

*Petitioners,*

v.

LUNGISILE NTSEBEZA, HERMINA DIGWAMAJE, KHULUMANI SUPPORT GROUP, *ET AL.*

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

KENNETH S. GELLER
MARC R. COHEN
ANDREW J. PINCUS
CHARLES A. ROTHFELD
*Mayer Brown LLP*
*1909 K Street, NW*
*Washington, DC 20006*
*(202) 263-3000*

FRANCIS P. BARRON
*Counsel of Record*
DAVID GREENWALD
*Cravath, Swaine & Moore LLP*
*825 Eighth Avenue*
*New York, NY 10019*
*(212) 474-1000*

[Additional Counsel listed on signature page of Petition]

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# APPENDIX A[1]

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2005

(Argued: January 24, 2006

Decided: October 12, 2007)

Docket Nos. 05-2141-cv, 05-2326-cv

SAKWE BALINTULO KHULUMANI, as personal representative of Saba Balintulo, FANEKAYA DABULA, as personal representative of Lungile Dabula, NOKITSIKAYE VIOLET DAKUSE, as personal representative of Tozi Skweyiya, BERLINA DUDA, as personal representative of Donald Duda, MARK FRANSCH, as personal representative of Anton Fransch, SHERIF MZWANDILE GEKISO, as personal representative of Ntombizodwa Annestina Nyongwana, ELSI GUGA, as personal representative of James Guga, JOYCE HLOPHE, as personal representative of Jeffrey Hlophe, NOMVULA EUNICE KAMA, as personal representative of Mncedisi Dlokova, JOYCE LEDWABA, as personal representative of Samuel Ledwaba, JOHANA LERUTLA, as personal representative of Matthews Lerutla, FRIEDA Z. LUKHULEI, as personal representative of Tokkie Lukhulei, ELIZABETH MAAKE, as personal representative of Jackson Maake, ARCHITON MADONDO, as personal representative of Mandla Madondo, BENJAMIN MAIFADI, TSHEMI MAKE-

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[1] The opinion reproduced here reflects the errata orders issued by the court of appeals on November 28, 2007, December 5, 2007, December 6, 2007, December 14, 2007, and December 28, 2007.

DAMA, as personal representative of Lugile Makedama, MABEL MAKUPE, as personal representative of Andrew Makupe, MABEL MALOBOLA, as personal representative of Malobola Mbuso, EVELYN MATISO, as personal representative of Pitsi Matiso, BETTY MGIDI, as personal representative of Jeffrey Mgidi, ELIZABETH MKHONWANA, as personal representative of Obed Mkhonwana, CATHERINE MLANGENI, as personal representative of Bheki Mlangeni, CECIL MLANJENI, as personal representative of Kele Mlanjeni, SAMUEL MORUDU, as personal representative of Sannah P. Leslie, TSHIDISO MOTASI, as personal representative of John and Penelope Moloke, WILLIE NELANI, as personal representative of Mongezi Nelani, CATHERINE NGQULUNGA, as personal representative of Brian Ngqulunga, CATHERINE PHIRI, as personal representative of Thomas Phiri, ELIZABETH SEFOLO, as personal representative of Harold Sefolo, MARIA SIBAYA, as personal representative of Jeffrey Sibaya, PATRICIAL M. SONGO, as personal representative of Dipulo Songo, MPOLONTSI TYOTE, as personal representative of Boyboy Tyote, NOMKHANGO SKOLWENI DYANTYI, CLIFFORD ZIXELILE FUDUKILE, WINDOVOEL GAAJE, CHARLES HLATSHWAYO, MOSES HLONGWANE, LESIBA KEKANA, SANAKI MAHLATSHI, ROBERT MAKANA, ZAKHARIA FIKILE MAMBA, ELLIOT SITHEMBISO MARENENE, ALFRED MASEMOLA, MAUREEN THANDI MAZIBUKO, MICHAEL MBELE, LAETITIA NOMBAMBO MFECANE, as personal representative of Rubin Mfecane, DENNIS MLANDELI, TEFO MOFOKENG, MOTLALETSATSI MOLATEDI, AZARIEL MOLEBELELI, SIMON MOLOTSI, LINA

MOREANE, as personal representative of Albert Xaba, THABISO SAMUEL MOTSIE, SONTO NDLOVU, MANGINDIVA ROBERT RHENENE, THOBILE SIKANI, BUBELE STEFANE, NOLUTHANDO BILETILE, LESLIE MNCEDISI BOTYA, LEON DUKASCHE, ELSIE GISHI, DORTHIA GOMO-PEFILE, ZAMIKHAYA BISHOP KHALI, JAMES MAGABANA, NOSIPHO MANQUBA, NOTATHU EUGENIA MATOMELA, NOMISA THERSIA MAY, MBONGENI NELSON MBESHU, MZUHLANGENA NAMA, ELIAS NGAMANI, as personal representative of Elizabeth Nagamani, GESHIA NGOXZA, LUCAS NDUKWAYIBUZWA NGWENYANA, WELLINTON MTYUKATO NKOSIPHENDULE, VUYANI NONGCAMA, SINDISWA MIRRIAM NUNU, THULANI NUNU, BONIWE PHALAZA, PATHISWA PRINGANE, as personal representative of Mthozama Theophilus Pringane, MTHUTUZELI SIKANI, NOLUTHANDO SILETILE, THEMBEKA VICTORIA SIPHAHO, JOHANNES TITUS, MPOLONTSI TYOTES, MTHUZIMELE MEFORD YAMILE, NTUNANI WILLIAM ZENANI, THANDIWE SHEZI, ELIAS B. BONENG, DENNIS VINCENT FREDERICK BRUTUS, MORALOKI A. KGOBE, REUBEN MPHELA, LULAMILE RALRALA,

*Plaintiffs-Appellants,*

-v.-

BARCLAY NATIONAL BANK LTD., BRITISH PETROLEUM, PLC, CHEVRONTEXACO CORPORATION, CHEVRONTEXACO GLOBAL ENERGY, INC., CITIGROUP, INC., COMMERZBANK, CREDIT SUISSE GROUP, DAIMLERCHRYSLER AG, DEUTSCHE BANK AG, DRESDNER BANK AG, EXXONMOBIL CORPORATION, FORD MO-

TOR COMPANY, FUJITSU, LTD., GENERAL MOTORS CORPORATIONS, INTERNATIONAL BUSINESS MACHINES CORP., J.P. MORGAN CHASE, SHELL OIL COMPANY, and UBS AG,

*Defendants-Appellees,*

AEG DAIMLER-BENZ INDUSTRIE, FLUOR CORPORATION, RHEINMETALL GROUP AG, RIO TINTO GROUP, TOTAL-FINA-ELF and DOE CORPORATIONS,

*Defendants.*

LUNGISILE NTSEBEZA,* HERMINA DIGWAMAJE, ANDILE MFINGWANA, F.J. DLEVU, LWAZI PUMELELA KUBUKELI, FRANK BROWN, SYLVIA BROWN, NYAMEKA GONIWE, SIGQIBO MPENDULO, DOROTHY MOLEFI, THEMBA MEQUBELA, LOBISA IRENE DIGWAMAJE, KAELO DIGWAMAJE, LINDIWE PETUNIA LEINANA, MATSHIDISO SYLVIA LEINANA, KELEBOGILE PRUDENCE LEINANA, DAVID MOTSUMI, SARAH NKADIMENG, MOEKETSI THEJANE, MOSHOESHOE THEJANE, PASCALINAH BOOKIE PHOOFOLO, KHOBOTLE PHOOFOLO, GLADYS MOKGORO, JONGANI HUTCHINGSON, SEFUBA SIDZUMO, GOBUSAMANG LAURENCE LEBOTSO, EDWARD THAPELO TSHIMAKO, RAHABA MOKGOTHU, JONATHAN MAKHUDU LEDIGA, ANNA LEBESE, SIPHO STANLEY LEBESE, WILLIAM NBOBENI, JOHN LUCAS NGOBENI, CLEMENT HLONGWANE and MASEGALE MONNAPULA,

*Plaintiffs-Appellants,*

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* We direct the Clerk of Court to amend the official caption to reflect this spelling of Ntsebeza's name, which is consistent with the spelling used in his briefs and complaint.

SAKWE BALINTULO KHULUMANI, P.J. OLAYI, WELLINGTON BANINZI GAMAGU, Violations of Pass Laws, unlawful detention 1981-1983, torture subjected to discriminatory labor practices 1981 and WILLIAM H. DURHAM,

*Plaintiffs,*

v.

DAIMLER CHRYSLER CORPORATION, NATIONAL WESTMINSTER BANK PLC, COLGATE PALMOLIVE, BARCLAYS BANK PLC, UBS AG, CITIGROUP INC., DEUTSCHE BANK AG, DRESDNER BANK AG, COMMERZBANK AG, FORD MOTOR COMPANY, HOLCIM, INC., EXXON MOBIL CORPORATION, SHELL OIL COMPANY, J.P. MORGAN, MINNESOTA MINING AND MANUFACTURING CO. (3M CO.), GENERAL ELECTRIC COMPANY, BRISTOL-MEYERS SQUIBB CO., E.I. DUPONT DE NEMOURS, XEROX CORPORATION, IBM, GENERAL MOTORS, HONEYWELL INTERNATIONAL, INC., BANK OF AMERICA, N.A., THE DOW CHEMICAL COMPANY, COCA-COLA CO., CREDIT AGRICOLE S.A., HEWLETT-PACKARD COMPANY, EMSCHEMIE (NORTH AMERICA) INC., CHEVRON TEXACO CORPORATION, AMERICAN ISUZU MOTORS, INC. and NESTLE USA, INC.,

*Defendants-Appellees,*

SULZER AG, SCHINDLER HOLDING AG, ANGLO-AMERICAN CORPORATION, DEBEERS CORPORATION, NOVARTIS AG, BANQUE INDO SUEZ, CREDIT LYONNAIS, and Unknown officers and directors of DANU INTERNATIONAL, STANDARD CHARTERED, P.L.C., CORPORATE DOES, CREDIT SUISSE GROUP, CITIGROUP AG, SECURITIES INC., as successor to Morgan Guaranty,

MANUFACTURERS HANNOVER, CHEMICAL BANK & CHASE MANHATTAN BANK, UNISYS CORPORATION, SPERRY CORPORATION, BURROUGHS CORPORATION, ICL, LTD., AMDAHL CORP., Computer Companies, JOHN DOE CORPORATION, HOLCIN, LTD., HENRY BLODGET, JUSTIN BALDAUF, KRISTEN CAMPBELL, VIRGINIA SYER GENEREUX, SOFIA GHACHEM, THOMAS MAZZUCCO, EDWARD McCABE, DEEPAK RAJ, JOHN 1-10 DOE, OERLIKON CONTRAVES AG, OERLIKON BUHRLE AG, CORPORATE DOES 1-100, ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT & TRADING COMPANY PLC and SHELL PETROLEUM, INC., MERRILL LYNCH & CO INC., KENNETH SEYMOUR,

*Defendants.*

BEFORE: KATZMANN and HALL, *Circuit Judges*, and KORMAN, *District Judge*.**

Appeal from a judgment of the United States District Court for the Southern District of New York (Sprizzo, J.), dismissing, *inter alia*, plaintiffs-appellants' claims under the Alien Tort Claims Act ("ATCA") and the Torture Victim Protection Act ("TVPA"). We affirm the district court's dismissal of the TVPA claims. We vacate that portion of the district court's judgment dismissing the plaintiffs' ATCA claims, as well as the district court's denial of the Digwamaje, and Ntsebeza motions to amend, and remand for further proceedings consistent with this opinion. Judge KATZMANN files a separate concur-

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**The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

ring opinion. Judge HALL files a separate concurring opinion. Judge KORMAN files a separate opinion, concurring in part II and dissenting from parts III, IV, and V of the per curiam opinion.

Affirmed in part, vacated in part, and remanded.

MICHAEL D. HAUSFELD
Cohen, Milstein, Hausfeld & Toll, P.L.L.C.
Washington, D.C. for
*Khulumani Plaintiffs-Appellants.*
PAUL L. HOFFMAN
Schonbrun DeSimone Seplow Harris & Hoffman LLP
Venice, California for
*Ntsebeza & Digwamaje Plaintiffs-Appellants.*
FRANCIS P. BARRON Cravath, Swaine & Moore LLP New York, New York for
*Defendants-Appellees.*
ROBERT M. LOEB United States Department of Justice Washington, D.C. for
*Amicus Curiae United States of America.****

PER CURIAM:

I

The plaintiffs in this action bring claims under the Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA"), against approximately fifty corporate defendants and hundreds of "corporate Does." The

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***A dozen entities participated as *amici*, but only the United States participated in oral argument of the appeal.

plaintiffs argue that these defendants actively and willingly collaborated with the government of South Africa in maintaining a repressive, racially based system known as "apartheid," which restricted the majority black African population in all areas of life while providing benefits for the minority white population.

Three groups of plaintiffs filed ten separate actions in multiple federal district courts asserting these apartheid-related claims. *See In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 542 (S.D.N.Y. 2004). One group, the Khulumani Plaintiffs, filed a complaint against twenty-three domestic and foreign corporations, charging them with various violations of international law.[1] The other two groups, the Ntsebeza and Digwamaje Plaintiffs, brought class action claims on behalf of the "victims of the apartheid related atrocities, human rights' violations, crimes against humanity and unfair [and] discriminatory forced labor practices." The Digwamaje Plaintiffs also brought claims under the Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (1992), codified at 28 U.S.C. § 1350 note ("TVPA"), and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO").

In August 2002, the Ntsebeza Plaintiffs filed a motion with the Judicial Panel on Multidistrict Liti-

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[1] The Khulumani Plaintiffs include the Khulumani Support Group, a South African nongovernmental organization that "works to assist victims of apartheid-era violence and has 32,700 members who are survivors of such violence," as well as ninety-one individual plaintiffs who are "the personal representatives of victims of extrajudicial killing, or were themselves tortured, sexually assaulted, indiscriminately shot, or arbitrarily detained by the apartheid regime."

gation ("MDL Panel") to transfer all of the actions to the Southern District of New York, and in December 2002, the MDL Panel ordered that transfer for coordinated pre-trial proceedings. *See In re S. African Apartheid Litig.*, 238 F. Supp. 2d 1379, 13 80–81 (J.P.M.L. 2002). In July 2003, thirty-one of the fifty-five defendants in the Ntsebeza and Digwamaje actions filed a joint motion to dismiss. Following the transfer of the Khulumani complaint to the Southern District of New York, eighteen of the twenty-three defendants in that action also filed a joint motion to dismiss.[2]

Later that month, Penuell Mpapa Maduna, who was then the Minister of Justice and Constitutional Development for South Africa, submitted an *ex parte* declaration to the district court, stating that the South African government regarded these proceedings as interfering "with a foreign sovereign's efforts to address matters in which it has the predominant interest" and asking that the proceedings be dismissed.[3] After receiving the South African declara-

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[2] Apparently, not all of the named defendants in the three actions have been served with complaints, and some defendants have indicated that they plan to contest personal jurisdiction. The district court's order granting the motion to dismiss stated that it was "limited to those defendants as to whom the Court's personal jurisdiction is not contested." *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 543 n.3. In addition, eleven of the defendants who joined the motion to dismiss filed separate motions to dismiss on the ground that the plaintiffs' claims were conclusory and failed to meet the pleading standards of Fed. R. Civ. P. 8(a). The district court did not reach those arguments in deciding the motion to dismiss.

[3] The Ntsebeza and Digwamaje Plaintiffs moved to strike Maduna's declaration and submissions, asserting that the declaration contained "legal argument by a non-party" and "con-

tion, the district court, *sua sponte*, solicited the views of the United States Department of State.[4] The State Department responded by submitting a "Statement of Interest" asserting that "continued adjudication of the above-referenced matters risks potentially serious adverse consequences for significant interests of the United States."

Ruling on the defendants' motions to dismiss, the district court held that the plaintiffs failed to establish subject matter jurisdiction under the ATCA. The district court ruled further that the plaintiffs, having asserted diversity as an alternate basis for jurisdiction, could not establish subject matter jurisdiction on that ground. The district court also held that the plaintiffs failed to state a claim under the TVPA and failed to establish subject matter jurisdiction under RICO. *See In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 554–57. The district court therefore dismissed the plaintiffs' complaints in their entirety. *See id.* at 557. In March 2005, the Ntsebeza and Digwamaje Plaintiffs moved for permission to file an amended consolidated complaint,[5] which the district

clusory allegations not supported by any creditable citation to the record," and recited "disputed evidentiary facts." They also argued that international comity could only be raised by a party as an affirmative defense, and even if comity were available, "it would be inappropriate for the Court to dismiss this case without making fact-bound determinations that cannot be made on this record ...." The docket sheet indicates that the district court never ruled on this motion.

[4] Specifically, the district court inquired whether "adjudication of these cases would have an adverse impact on the interests of the United States and, if so, the nature and significance of any such impact."

[5] The plaintiffs sought to provide particularized allegations directed at particular defendants, to "meet the new *Sosa* standard," and to clarify for the district court that their ATCA

court denied. *See* Part IV, *infra*. Following the district court's issuance of an amended judgment containing an amended Rule 54(b) certification, the plaintiffs filed timely notices of appeal.[6]

II

All members of the panel join to affirm the district court's dismissal of the Digwamaje Plaintiffs' TVPA claims. The Digwamaje Plaintiffs asserted a claim under the TVPA, alleging that the defendants "aided and abetted the apartheid regime's subjecting the Plaintiffs to torture and extrajudicial killing within the meaning of the Torture Victim Protection Act ...under actual or apparent authority, or under color of law." The TVPA provides:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation–
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350 note § 2(a). For purposes of the TVPA, an individual "acts under color of law ...when he acts together with state officials or with signifi-

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claims were not based upon the corporations "merely doing business" in South Africa.

[6] The Digwamaje Plaintiffs have not challenged the dismissal of their RICO claim.

cant state aid." *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995). The Digwamaje Plaintiffs, although twice having amended their complaint, failed to link any defendants to state aid or the conduct of state officials.

Further, based on the district court's discussion of the matter of diversity jurisdiction, we affirm the dismissal of the complaints insofar as they seek to assert jurisdiction under 28 U.S.C. § 1332(a)(3).

## III

Two members of this panel join to vacate the district court's dismissal of the plaintiffs' ATCA claims because the district court erred in holding that aiding and abetting violations of customary international law cannot provide a basis for ATCA jurisdiction. We hold that in this Circuit, a plaintiff may plead a theory of aiding and abetting liability under the ATCA. The respective rationales of Judges Katzmann and Hall are set forth in separate concurring opinions.

## IV

We further vacate the district court's order denying plaintiffs' motion for leave to amend. In denying this motion, the district court relied, in part, on the erroneous premise that subject matter jurisdiction did not inhere and reasoned that any additional amendments to the pleadings would be futile. Because the denial of the motion rested, in part, on this erroneous premise, we vacate that order. *See Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 177 (2d Cir. 2006) ("The standard for reviewing the denial of a motion to amend a complaint is abuse of discretion ..." (internal quotation marks omitted)); *see also Zervos v. Verizon N. Y., Inc.*, 252 F.3d 163, 169 (2d Cir.

2001) ("A district court 'abuses' or 'exceeds' the discretion accorded to it when ... its decision rests on an error of law (such as application of the wrong legal principle ...").[7] Until the district court has an opportunity to rule on the motion to amend, we cannot be sure that the pleadings in the record before us represent the final version of the plaintiffs' allegations. We therefore decline to determine whether the plaintiffs have adequately pled a violation of international law sufficient to avail themselves of jurisdiction under the ATCA and remand to the district court to allow it to address the pleadings after amendment as may be permitted has occurred.

V

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[7] Although the district court rested its decision to deny the plaintiffs' motion to replead on several grounds, it is not clear from the district court's order that it would have reached the same result in the absence of its erroneous belief that any amendment would be futile. It seems most respectful of the district court's considerable discretion in this area to allow it to determine in the first instance whether to allow the plaintiffs to replead. In that same vein, we also leave to the district court on remand the first opportunity to consider any motion that may be filed by the Khulumani plaintiffs seeking permission to amend their complaint.

We do not, however, believe it is necessary to vacate the district court's order to the extent that it denied the plaintiffs' motion with respect to their TVPA claims. Given that the plaintiffs had previously amended their complaint twice and did not bring the present motion to amend until after the district court's order dismissing the case, the district court did not abuse its discretion in denying them leave to replead. *See, e.g., Gurary v. Winehouse*, 235 F.3d 792, 801 (2d Cir. 2000) ("A district court has broad discretion in determining whether to grant leave to amend, and we review such determinations for abuse of discretion.").

Moreover, we decline to affirm the dismissal of plaintiffs' ATCA claims on the basis of the prudential concerns raised by the defendants.[8] In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004), the Supreme Court identified two different respects in which courts should consider prudential concerns in deciding whether to hear claims brought under the ATCA. First, the Supreme Court held that courts should consider prudential concerns in the context of determining whether to recognize a cause of action under the ATCA. Specifically, the Court explained that "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Sosa*, 542 U.S. at 732-33 (internal footnote

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[8] In his dissent, Judge Korman adamantly asserts that our opinion fails to show deference to the position of the Republic of South Africa, a position that also commands the support of the United States Department of State. Opinion of Judge Korman at 92–100. He presents an analysis of prudential considerations, the strength of which we decline to address, that may well suggest a roadmap for future motion practice before the district court on remand. *Id.* at 73–92. Implicit throughout is the suggestion that by correcting the district court's error and clarifying the applicability of accessorial liability to violations of international law, we have somehow irrevocably, and to the derogation of South Africa's sovereignty, relegated the plaintiffs' claims to the judicial processes of the United States. With all due respect, Judge Korman's position in this regard is overstated and ignores the fact that well before any steps can be taken to address the merits of plaintiffs' claims, the district court may allow for a full airing of prudential concerns and, if it so chooses, engage in an analysis of, and decision regarding, those and other issues, something that has been heretofore lacking.

omitted). Second, the Supreme Court recognized that, in certain cases, other prudential principles might operate to "limit[] the availability of relief in the federal courts for violations of customary international law." *Id.* at 733 n.21.[9]

One such principle specifically identified by the Court was "a policy of case-specific deference to the political branches." *Id.* This policy of "[j]udicial deference to the Executive Branch on questions of foreign policy has long been established under the prudential justiciability doctrine known as the 'political question' doctrine." *Whiteman v. Dorotheum GmbH & Co KG*, 431 F.3d 57, 69 (2d Cir. 2005). Another prudential doctrine that the defendants raise in this case is "international comity." *See, e.g., Sosa*, 542 U.S. at 761 (Breyer, J., concurring) (suggesting that courts should consider "whether the exercise of jurisdiction under the [ATCA] is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement"). This doctrine, the application of which "ordinarily lies within the discretion of the district court," asks whether "adjudication of [the] case by a United States court would offend amicable working relationships with [a

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[9] We reject the proposition endorsed by Judge Korman that the Supreme Court, in a footnote written while deciding a different case, would instruct us on how to decide this case, which was not before it. Opinion of Judge Korman at 73. Instead, we take the Supreme Court's language in footnote 21 of *Sosa* at face value, as simply observing that there is a strong argument that the views of the Executive Branch *on the issue of the case's impact on foreign policy* should be given "serious weight." *Sosa*, 542 U.S. at 733 n. 21. We view summary dismissal at the behest of a footnote as premature. *See Cent. Va. Cmty. College v. Katz*, 546 U.S. 356, 363 (2006).

foreign country]."[10] *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2d Cir. 2006) (internal quotation marks omitted).

In dismissing the plaintiffs' complaints below, the district court explicitly refrained from addressing the defendants' arguments that the ATCA claim presented a non-justiciable political question.[11] *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 543 n.4 ("Defendants also argue that ... the matter is a non-justiciable political question. Given the Court's finding that defendants are entitled to relief on other grounds, the Court need not address these remaining grounds for defendants' motion." (internal citation omitted)). Although the district court noted some collateral consequences that might result from the adjudication of these kinds of claims, the consequences it noted were primarily those "that would result from allowing courts in this country to hear civil suits for the aiding and abetting of violations of international norms across the globe." *Id.* at 551. Furthermore, the district court expressly characterized its consideration of the collateral consequences as fulfilling its "duty to engage in 'vigilant doorkeeping.'" *Id.* at 550 (quoting from Sosa, 542 U.S. at 729); *see also id.* at

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[10] The parties agree that *Sosa's* reference to "case-specific deference" implicates either the political question or international comity doctrine.

[11] Judge Korman suggests that the content of the Defendant's Joint Motion to Dismiss ("Joint Motion"), cited by the district court, supports the view that the issue of deference to other political branches was addressed below. Opinion of Judge Korman at 93. We fail to see how the content of a motion, the basis for which Judge Korman concedes the district court "declin[ed] to address," *id.*, lends any support to the proposition that the district court reached the issues addressed therein.

553. As *Sosa* makes clear, this duty is fulfilled in the decision of a federal court to exercise its judicial discretion to recognize a cause of action for a violation of customary international law, an issue distinct from whether the adjudication of a given suit is barred by political question doctrine. *Sosa*, 542 U.S. at 729. We see no reason to read the district court's citation to this part of *Sosa* as an indication that the court was also (and contrary to its explicit disclaimer) engaged in a consideration of the political question or other prudential doctrines.[12] To the extent that limited portions of the district court's discussion were addressed to the statements of interest submitted by the governments of the United States and South Africa, *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 553–54, these statements were merely illustrative of a general concern with what the court saw as the "far-reaching" consequences of the specific norm it was then discussing (*i.e.*, doing business in South Africa), *id.* at 553. The citation to *Sosa's* footnote 21 indicates only that the district court considered the views of those governments in assessing "the collat-

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[12] It was error for the district court to consider these collateral consequences in the context of deciding preliminarily whether it had jurisdiction to hear this case under the ATCA. However, even if we construed the district court's discussion of the "collateral consequences" as a decision not to recognize a cause of action for plaintiffs' claims, in which context consideration of these consequences would have been appropriate, remand would still be necessary because the district court's decision not to recognize a cause of action might still have rested, in part, on its erroneous view that the ATCA does not allow for claims of aiding and abetting liability. Because we cannot know whether the district court would have declined to recognize the cause of action plaintiffs bring in the absence of that error, we believe it is appropriate to remand, so it can have the opportunity to decide this issue in the first instance.

eral consequences that would result from finding a new international law violation," *id.*, and does not suffice to demonstrate that the court (again contrary to its stated intentions) adopted *sub rosa* the defendants' political question arguments.

We decline to address these case-specific prudential doctrines now and instead remand to the district court to allow it to engage in the first instance in the careful "case-by-case" analysis that questions of this type require. This approach is particularly appropriate here because the plaintiffs have indicated that, if given the opportunity, they would narrow their claims and clarify the nature of their allegations against the various defendants, changes that may affect how the district court ultimately decides to resolve these issues. Oral Argument Tr., Jan. 24, 2006 at 7–8, 14–15; *cf. Zivotofsky v. Sec'y of State*, 444 F.3d 614, 619–20 (D.C. Cir. 2006) (holding that, where the specific relief sought by the plaintiff had changed, remand was appropriate to allow the district court to develop a more complete record as to whether the revised claim presented a nonjusticiable political question).[13]

On remand, the district court will have an opportunity to consider the guidance provided by our prior cases regarding the relevant weight of statements of interest submitted by the United States and other governments. In *Whiteman*, for example, we addressed "when, and to what extent, ... the stated for-

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[13] While we cannot know how these developments will affect the positions of the United States and South Africa with respect to this litigation, the district court may wish to solicit anew the views of these governments, and thus that fact, too, counsels against us reaching these issues at this time.

eign policy interests of the United States [should] be accorded deference," and we held that we should be guided in this determination by "our application of the political question doctrine." 431 F.3d at 69, 71. In that context, we held that "not every case 'touching foreign relations' is nonjusticiable and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights. We believe a preferable approach is to weigh carefully the relevant considerations on a case-by-case basis." *Id.* at 69 (quoting *Kadic*, 70 F.3d at 249). We have held that "even an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication."[14] *Kadic*, 70 F.3d at 250. Likewise, although the views of foreign nations are an important consideration under the doctrine of "international comity," we have not held them to be dispositive. *See, e.g., Jota v. Texaco Inc.*, 157 F.3d 153, 159–61 (2d Cir. 1998). At this stage in the litigation, we express no view as to what level of deference to their views is appropriate in this particular case. Instead, we remand to the district court so that it

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[14] We do not believe the Supreme Court's statement in *Sosa* is to the contrary. *Sosa*, 542 U.S. at 733 n.21 (noting only that "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"). Indeed, to give dispositive weight to the Executive Branch's views would likely raise serious separation-of-powers concerns. Cf., e.g., *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972) (Powell, J., concurring) ("I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine.").

may carefully consider whether any of these doctrines require dismissal.

## VI

We therefore AFFIRM the district court's dismissal of the Digwamaje Plaintiffs' TVPA claims. We also AFFIRM the district court's determination that the plaintiffs have failed to satisfy the diversity requirements of 28 U.S.C. § 1332(a)(3). We VACATE the district court's dismissal of the plaintiffs' ATCA claims, as well as the district court's denial of the Digwamaje and Ntsebeza Plaintiffs' motions to amend and REMAND for further proceedings consistent with this opinion.

KATZMANN, *Circuit Judge*, concurring:

This case calls upon us in principal part to determine whether the district court erred in concluding that it does not have jurisdiction over the plaintiffs' claims brought under the Alien Torts Claim Act ("ATCA"), 28 U.S.C. § 1350. I respectfully believe that the district court erred in its analysis of plaintiffs' ATCA claims in two fundamental respects. First, it conflated the jurisdictional and cause of action analyses required by the ATCA. As a result, the district court mistakenly incorporated a discretionary analysis into the determination of whether it has jurisdiction under the ATCA. Second, it erroneously held that aiding and abetting liability does not exist under international law.

## I

The ATCA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.*

When we last substantively grappled with the meaning of this statute, we noted that "neither Congress nor the Supreme Court ha[d] definitively resolved the complex and controversial questions regarding the meaning and scope of the ATCA." *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 247 (2d Cir. 2003). The next year the Supreme Court weighed in on the modern resurgence of the statute in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). While the Court did not definitively resolve all of the complex and controversial questions the ATCA raises, it did clarify to a significant degree how claims brought under the ATCA should be analyzed.

*Sosa* endorsed our Court's prior approach to the ATCA to the extent that we recognized that the Act created jurisdiction for a narrow set of violations of international law, *see id.* at 720 ("Congress intended the [ATCA] to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations."); *see also Filartiga v. Pena-Irala*, 630 F.2d 876, 887–88 (2d Cir. 1980) (construing the ATCA "as opening the federal courts for adjudication of ... well-established, universally recognized norms of international law"), and that a plaintiff's claim "must be gauged against the current state of international law," *Sosa*, 542 U.S. at 733; *see also Filartiga*, 630 F.2d at 881 ("[I]t is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."). The Court also generally endorsed the cautious approach that we had long applied in determining whether to hear cases brought under the ATCA. *See, e.g., Sosa*, 542 U.S. at 728–29 (noting that "great caution" must be exercised in deciding which "norms of today's law of nations may . . . be recognized legitimately by federal courts"); *see also Flores*, 414

F.3d at 248 ("[I]n determining what offenses violate customary international law, courts must proceed with extraordinary care and restraint.").

*Sosa* did, however, deviate from our case law in one crucial respect. We had allowed cases to proceed under the ATCA on the assumption that when plaintiffs alleged violations of well-established international law, their "causes of action are statutorily authorized." *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995); *see also Flores*, 414 F.3d at 245 (discussing the reception of *"Filartiga's* holding that the ATCA creates a private right of action for violations of United States treaties or customary international law"). The Supreme Court flatly rejected this notion. *See Sosa*, 542 U.S. at 713-14 (citing William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law Of Nations*, 18 Conn. L. Rev. 467, 479, 480 (1986)). *Sosa* construed the statute instead to be of a "strictly jurisdictional nature," in the sense that it "address[ed] the power of the courts to entertain cases concerned with a certain subject." 542 U.S. at 713, 714.

This holding led the Court to explore "a new question, this one about the interaction between the [ATCA] at the time of its enactment and the ambient law of the era." *Id.* at 714. The Court rejected the argument that the First Congress passed the ATCA "as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action." *Id.* at 719. Rather, the historical materials suggested that "the statute was intended to have practical effect the moment it became law." *Id.* at 724. This practical effect would be achieved through the invocation of causes of action already available at

common law. Because some "torts in violation of the law of nations were understood to be within the common law" of 1789, the First Congress would have "understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations." *Id.* at 720, 724. No further substantive legislation was required. *Id.* at 724 ("The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.").

Finding that "no development in the two centuries from the enactment of § 1350 to [today] has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law," *id.* at 724–25, the Court held that federal courts retained the ability to "adapt[] the law of nations to private rights" by recognizing "further international norms as judicially enforceable today," *id.* at 728, 729. Most importantly, these norms were enforceable not by virtue of this statutory creation or authorization of a private right of action, as we had previously assumed, but rather through an exercise in "residual common law discretion" to create causes of action under federal common law to remedy the violation of those norms. *Id.* at 738; *see also id.* at 728–31. Thus, *Sosa* makes clear that all ATCA litigation is in fact based on federal common law, rather than a statutory cause of action. But a federal court's power to create these causes of action is not without limits. Indeed, the Court identified a number of "good reasons for a restrained conception of the discretion a federal court should exercise in considering

a new cause of action of this kind."[1] *Id.* at 725, 728. Its consideration of these factors led the Court to identify a minimum requirement "for accepting a cause of action subject to jurisdiction under § 1350," namely, that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Id.* at 732.

Based on the Supreme Court's holdings in *Sosa* that (1) the ATCA is purely jurisdictional and (2) the common law provides the cause of action for claims brought under that jurisdiction, a federal court faced with a suit alleging a tort in violation of international law must undertake two distinct analytical inquiries. One is whether jurisdiction lies under the ATCA. The other is whether to recognize a common-law cause of action to provide a remedy for the alleged violation of international law. Requiring this analytical separation in ATCA litigation comports with the general principle that whether jurisdiction exists and whether a cause of action exists are two

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[1] This "series of reasons" comprises (1) a change in the "prevailing conception of the common law" such that there is now "a general understanding that the law is not so much found or discovered as it is either made or created," *Sosa*, 542 U.S. at 725; (2) a "rethinking of the role of the federal courts in making it," *id.* at 726; (3) the recognition that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases," *id.* at 727; (4) the fact that "attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences," *id.* at 727–28; and (5) the lack of a "congressional mandate" to engage in judicial lawmaking in this area, *id.* at 728.

distinct inquiries. *See TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 74 (2d Cir. 2002) (noting the Supreme Court's holding that "'the question whether a federal statute creates a claim for relief is not jurisdictional'" (quoting *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365 (1994)); *cf. Rasul v. Bush*, 542 U.S. 466, 484–85 (2004) (reversing the D.C. Circuit's holding that jurisdiction did not lie under the ATCA without engaging in a cause of action inquiry). Moreover, it reflects the fact that it is Congress, and not the courts, that possesses the power to define the scope of the courts' jurisdiction. *Cf. Whitmore v. Arkansas*, 495 U.S. 149, 155–56, 161 (1990) (noting that "[a] federal court is powerless to create its own jurisdiction" and that a court may not "employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case"). Thus, one might question the extent to which a federal court should exercise its own judgment about the practical consequences of allowing a suit to go forward in the context of its jurisdictional inquiry when, according to the plain language of the ATCA, that inquiry is resolved solely by reference to international law. *Cf. Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593 (1980) (noting that courts should look to Congress's intent, and not policy considerations, when construing the terms of a jurisdictional statute).[2] By contrast, it is entirely appropriate for courts

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[2] Federal courts may, of course, decline to accept jurisdiction over a particular case in appropriate circumstances and in accordance with the well-established principles that guide such decisions. I merely suggest that because federal courts "have only the jurisdiction granted to them by Congress," *Carlyle Towers Condo. Ass'n, Inc. v. FDIC*, 170 F.3d 301, 306 (2d Cir. 1999), their exercise of common-law discretion is better viewed as creating a cause of action than jurisdiction. *Cf. Bolin v.*

to consider such concerns in the context of determining whether to recognize a cause of action under federal common law.

Having identified the two steps of the inquiry, I now elaborate on what each inquiry requires. Aside from noting that "Congress intended the [ATCA] to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations," *Sosa*, 542 U.S. at 720, the Supreme Court did not discuss the requirements for invoking this jurisdictional grant in a particular case. The ATCA, by its terms, "confers federal subject-matter jurisdiction when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations." *Kadic*, 70 F.3d at 238. In *Flores*, we held that the law of nations, or customary international law,[3] "is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." 414 F.3d at 248; *see also The Paquete Habana*, 175 U.S. 677, 708 (1900) (describing a rule of international law as one reached by "general consent of the civilized nations of the world" and "founded on considerations of ... the mutual convenience of belligerent states"). In determining whether a given offense meets these requirements, we look to the sources of law identified by the Statute of the International Court of Justice ("ICJ Statute") as the proper sources

*Sears, Roebuck & Co.*, 231 F.3d 970, 974 (5th Cir. 2000) (holding that Congress's grant of authority to the Supreme Court to make rules that affect only the timing of appeals does not constitute an improper delegation of its power to confer jurisdiction).

[3] In *Flores* we noted that the law of nations, as used in the ATCA "refers to the body of law known as customary international law." 414 F.3d at 247.

of international law. *See Flores*, 414 F.3d at 250–5 1. These include:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
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> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> [and]
>
> d. ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

ICJ Statute, art. 38, June 26, 1945, 59 Stat. 1055, 1060.

If jurisdiction is established, the second inquiry is whether a common-law cause of action should be created to provide a remedy for the alleged violation of international law. Recognizing that "there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind," the Court in *Sosa* "require[d] any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized," namely, "violation of safe conducts, infringement of the rights of ambassadors, and piracy." 542 U.S. at 724–25; *see also id.* at 732 ("[W]e are persuaded that federal courts should not recognize private claims under fed-

eral common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."). In setting out this standard, the Court cited with approval our decision in *Filartiga*, noting that "[t]his limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court." *Id.*

The Supreme Court instructed that determining whether to recognize a new cause of action "should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Id.* at 732–33. I do not read *Sosa* as requiring that a court individually analyze each of the five reasons it identifies as "argu[ing] for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the ... statute." *Sosa*, 542 U.S. at 725. These reasons are already captured by the "high bar to new private causes of action" set by the requirement that a claim be accepted by the civilized world and defined with a sufficient degree of specificity. *See id.* at 727–32; *see also id.* at 725 (noting that "there are good reasons for a restrained conception of [a federal court's] discretion" and that "[a]ccordingly ... courts should require any claim" to meet its standard of acceptance and specificity); David H. Moore, *An Emerging Uniformity for International Law*, 75 Geo. Wash. L. Rev. 1, 40–41 (2006) ("Those concerns, which arise whenever [customary international law] is incorporated as federal common law, are mitigated by the specific definition and mutuality requirements."). I do, however, view the Court's instruction that an element of judgment must be involved in the decision to recog-

nize a cause of action as an invitation to lower courts to consider other prudential concerns consistent with Sosa's approach. As *Sosa* suggests, courts considering the "practical consequences" of recognizing a new cause of action should assess the consequences that might result from making the cause of action generally available to all potential plaintiffs.

In sum, a district court analyzing a claim under the ATCA will normally be required to engage in a two-part analysis. The district court here erred by failing to undertake separately the two parts of this analysis. By conflating these two questions, the district court inappropriately injected a discretionary element into the determination of whether it had jurisdiction under the ATCA. *See In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 551, 553–54. Of greater significance to the district court's ultimate disposition of the plaintiffs' claims, though, was its error in analyzing whether the plaintiffs had alleged a "violation of the law of nations," as is required for plaintiffs to establish both jurisdiction and a cause of action. It is to this analysis that I now turn.

## II

Asking whether "aiding and abetting international law violations ... [is a] violation[] of the law of nations that [is] 'accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms,'" *Id.* at 549 (quoting *Sosa*, 542 U.S. at 725), the district court concluded that it is not, noting that it found "little [in its review of international law] that would lead [it] to conclude that aiding and abetting international law violations is itself an international law violation that is universally accepted as a legal obligation," *id.* Although I

believe the district court was correct to look to international law, I disagree with its analysis.

A.

The district court's conclusion that its jurisdiction under the ATCA should depend on whether international law specifically recognizes liability for aiding and abetting violations of the law of nations is consistent with our prior case law. We have repeatedly emphasized that the scope of the ATCA's jurisdictional grant should be determined by reference to international law. *See Kadic*, 70 F. 3d at 238 (requiring courts to engage in a "searching review" of international law to verify that subject matter jurisdiction lies for a particular action); *see also Flores*, 414 F.3d at 248 (noting that "courts must proceed with extraordinary care and restraint" in "determining what offenses violate customary international law"); *Filartiga*, 630 F.2d at 887 ("The paucity of suits successfully maintained under the section is readily attributable to the statute's requirement of alleging a 'violation of the law of nations' [ ] at the jurisdictional threshold.").

It is also consistent with the Supreme Court's opinion in *Sosa*. The Court observed in a footnote that "whether a norm is sufficiently definite to support a cause of action" raises a "related consideration [of] whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 & n.20. While this footnote specifically concerns the liability of non-state actors, its general principle is equally applicable to the question of where to look to determine whether the scope of liability for a violation of international law should ex-

tend to aiders and abettors. Furthermore, in *Sosa*, the Supreme Court echoed our prior cases' emphasis on the narrowness of the ATCA's jurisdictional grant. *See id.* at 720 ("Congress intended the [ATCA] to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations."); *see also id.* at 712 (describing the statute as a "limited, implicit sanction to entertain the handful of international law *cum* common law claims understood in 1789"). I believe that we most effectively maintain the appropriate scope of this jurisdiction by requiring that the specific conduct allegedly committed by the defendants sued represents a violation of international law.

Most importantly, the district court's approach is consistent with *Sosa's* broader characterization of the relationship between federal common law and international law. The ATCA's jurisdictional grant "enable[s] federal courts to hear claims in a very limited category *defined by the law of nations*." *Id.* at 712 (emphasis added). Once a court determines that the defendants' alleged conduct falls within one of "the modest number of international law violations with a potential for personal liability" on the defendants' part, it then considers whether "the common law would provide a cause of action" to enable the plaintiffs to bring their claim. *Id.* at 724. The common law thus permits the "independent judicial recognition of actionable international norms," but the courts must, as *Sosa* cautioned, be "vigilant doorkeep[ers]." *Id.* at 729. We recognized this important role for domestic law in Kadic when we explained that the "law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law viola-

tions."[4] 70 F.3d at 246. A federal court is free, in the exercise of its common-law discretion, to decline to provide a cause of action for a violation of international law. *See Sosa*, 542 U.S. at 732–33; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring) (explaining that each state may choose whether to impose civil liability for violations of international law). But to assure itself that it has jurisdiction to hear a claim under the ATCA, it should first determine whether the alleged tort was in fact "committed in violation of the law of nations," 28 U.S.C. § 1350, and whether this law would recognize the defendants' responsibility for that violation.

B.

I conclude that the recognition of the individual responsibility of a defendant who aids and abets a violation of international law is one of those rules "that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." *Flores*, 414 F.3d at 248. Recognized as part of the customary law which authorized and was applied by the war crimes trials following the Second World War, it has been frequently invoked in international law instruments as an accepted mode of liability. During the second half of the twentieth century and into this century, it has been repeatedly recognized in numerous international treaties, most notably the Rome Statute of the International Criminal Court, and in the statutes creating the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the

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[4] In *Kadic* we assumed that the ATCA itself created the cause of action, *see* 70 F.3d at 246, but the same principle applies to the common law following *Sosa*.

International Criminal Tribunal for Rwanda ("ICTR").[5] Indeed, the United States concedes, and

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[5] The district court seems to have dismissed the significance of some of these sources because they imposed criminal and not civil responsibility. *See In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 550. This distinction finds no support in our case law, which has consistently relied on criminal law norms in establishing the content of customary international law for purposes of the ATCA. In *Kadic*, for instance, we held that a defendant could be held liable under the ATCA based on international criminal law norms prohibiting genocide and war crimes. *Kadic*, 70 F.3d at 241–42. In concluding that genocide was actionable under the ATCA, the *Kadic* court relied on a United Nations resolution declaring that genocide is a "crime under international law," G.A. Res. 96(I), at 188–89, U.N. Doc. A/64 (Dec. 11, 1946), the London Charter, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, E.A.S. 472, and the Genocide Convention, Convention on the Prevention and the Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, which confirms that "genocide, whether committed in a time of peace or in time of war, is a *crime under international law* which [the contracting parties] undertake to prevent and to punish," *id.* at art. I (emphasis added); *see Kadic*, 70 F.3d at 241. *Kadic* also held that jurisdiction existed under the ATCA for "claims of war crimes" because "[t]he liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II," *id.* at 243, notwithstanding that the Nuremberg trials were criminal proceedings and that the proscription of war crimes is self-evidently criminal in nature.

Our past reliance on criminal law norms seems entirely appropriate given that, as Justice Breyer observed in *Sosa*, international law does not maintain the kind of hermetic seal between criminal and civil law that the district court sought to impose. *See Sosa*, 542 U.S. at 762–63 (Breyer, J., concurring). "[T]he criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself." *Id.* Moreover, the ICTY has recognized the pro-

the defendants do not dispute, that the concept of criminal aiding and abetting liability is "well established" in international law.[6] Brief for the United States as Amicus Curaie, at 21.

The London Charter, which established the International Military Tribunal at Nuremberg, was entered into by the allied powers of World War II, "acting in the interests of all the United Nations," to establish a tribunal to punish violations of international law. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, pmbl., Aug. 8, 1945, E.A.S. 472 (hereinafter London Charter). We have previously

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priety of civil remedies for violations of international criminal law in certain circumstances, noting for example that a torture victim might "bring a civil suit for damage in a foreign court." *Prosecutor v. Furundzija*, Case No. IT-95- 17/1, Trial Chamber Judgment, ¶ 155 (Dec. 10, 1998).

[6] The United States also notes that the law governing the initial military commissions established to prosecute acts of international terrorism following the September 11 attacks recognized aiding and abetting as a mode of liability. *See* Crimes and Elements for Trials by Military Commission, 32 C.F.R. § 11 .6(c)(1) (2003). The jurisdiction of the military tribunals was limited to established violations of the law of war or to "offenses that, consistent with that body of law, are triable by military commission." 32 C.F.R. § 11.3(a). The law of war has long been recognized as a subset of international law. *See Ex parte Quirin*, 317 U.S. 1, 27–28 (1942) ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."). While the Supreme Court eventually found that the military commissions lacked the power to proceed, *see Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2759 (2006), nothing in that decision addressed the propriety of including aiding and abetting liability as part of the commissions' jurisdiction.

recognized the London Charter as an authoritative source of customary international law. *See Flores*, 414 F.3d at 244 n. 18; *United States v. Yousef*, 327 F.3d 56, 105 nn.39–40 (2d Cir. 2003) (citing the London Charter for definitions of war crimes and crimes against humanity under international law). Moreover, other courts, international bodies, and scholars have recognized that the principles set out in the London Charter and applied by the International Military Tribunal are significant not only because they have garnered broad acceptance, but also because they were viewed as reflecting and crystallizing preexisting customary international law. *See Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994) ("The trials for the first time made explicit and unambiguous what was theretofore, as the Tribunal has declared, implicit in International Law ... " (citation, alteration, and internal quotation marks omitted)); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) ("The legitimacy of the Nuremberg prosecutions rested ... on the nature of the acts [the defendants] committed: acts that the laws of all civilized nations define as criminal. The universal and fundamental rights of human beings identified by Nuremberg ... are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*." (citations omitted)); Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 Am. J. Int'l L. 551, 559 (2006) ("[T]he Nuremberg and Tokyo Tribunals drew heavily on the 1929 Geneva Prisoner of War Convention and the Fourth Hague Convention of 1907 as establishing the substantive law to be applied—that is, as customary law and general principles of criminal law, and as norms of both state responsibility and individual criminal

liability." (footnotes omitted)). Indeed, shortly after the conclusion of the initial war crimes trials, the General Assembly of the United Nations unanimously approved a resolution affirming "the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal." Affirmation of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal, G.A. Res. 95 (I), at 188, U.N. Doc. A/236 (Dec. 11, 1946) (hereinafter Nuremberg Principles Resolution I).

The London Charter extended individual responsibility for crimes within its jurisdiction not only to "[l]eaders, organizers, [and] instigators" but also to "accomplices participating in the formulation or execution of a common plan or conspiracy to commit" any of the crimes triable by the Tribunal. London Charter art. 6. While the Charter's language taken "literally ... would seem to imply that the complicity rule did not apply to crimes perpetrated by individual action," as opposed to by common plan, in practice the Tribunal "applied general principles of criminal law regarding complicity." International Law Commission, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries, G.A.O.R., 5th session, Supp. No. 12, U.N. Doc. A/1316, ¶¶ 126-27 (1950) ("ILC Principles"). Accordingly, when the International Law Commission ("ILC") formulated the "principles recognized in the Charter ... and in the judgment of the Tribunal" at the direction of the General Assembly, *see* Nuremberg Principles Resolution I, it omitted any indication of a limitation on accomplice liability. Principle VII provides that "[c]omplicity in the commission of a crime against peace, a war crime, or a crime against

humanity ... is a crime under international law." ILC Principles, Principle VII. The ILC's formulation of the principles is considered to be an authoritative rendering of the formal holdings of the Nuremberg Tribunal and is consulted as an authoritative source of customary international law by the ICTY and ICTR. *See, e.g., Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Judgment, ¶ 526 (Sept. 2, 1998) (citing Principle VII to establish that "participation by complicity in the most serious violations of international humanitarian law was considered a crime as early as Nuremberg"); *see also Prosecutor v. Milosevic*, Case No. IT-02-54, Trial Chamber Decision on Preliminary Motions, ¶¶ 29–30 (Nov. 8, 2001) (finding that "[t]he customary character of [a] rule [of individual responsibility] is further supported by its incorporation in a wide number of other instruments," including, *inter alia*, the ILC Principles).

That the London Charter's use of the term "accomplice" was understood to include those who aid and abet a crime is further confirmed by the law applied in the war crimes trials held in the United States zone of occupation following World War II. War criminals in the United States zone of occupation were tried under Control Council Law No. 10, an act promulgated by the joint allied body that coordinated the governance of post-war Germany. Allied Control Council Law No. 10 (Dec. 20, 1945) *in Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at XVIII (William S. Hein & Co., Inc. 1997) (1949). Control Council Law No. 10 was patterned after the London Charter and enacted under its authority with the declared purpose to "give [it] effect." *Flick v. Johnson*, 174 F.2d 983, 985–86 (D.C. Cir. 1949). According to Telford Taylor, the Chief of Counsel for War Crimes

and the Chief Prosecutor for the United States under the London Charter, the "underlying principles" of the London Charter and Law No. 10 "are identical" and the tribunals operating under each "worked within the same framework" with respect to "the basic principles of international penal law." Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trial Under Control Council Law No. 10*, at 107 (1949), *available at* http://www.loc.gov/rr/frd/Military_Law/NT_final-report.html. Control Council Law No. 10 imposed criminal liability on anyone who was "an accessory to the commission of any such crime or ordered or *abetted* the same," Control Council Law No. 10, art. II, sec. 2 (emphasis added), and tribunals applying Control Council Law No. 10 are viewed by international bodies as having recognized aiding and abetting liability. *See Prosecutor v. Furundzija*, Case No. IT-95-17/1, Trial Chamber Judgment, ¶¶ 195–225, 236–40 (Dec. 10, 1998) (reviewing the case law).

We have previously acknowledged the contribution that Control Council Law No. 10 and the tribunals that applied it have made to customary international law. In *Flores*, to support our conclusion that "[c]ustomary international law rules proscribing crimes against humanity, including genocide, and war crimes, have been enforceable against individuals since World War II," 414 F.3d at 244 n.18, we pointed specifically to Brigadier General Taylor's assessment that "the major legal significance of the Law No. 10 judgments lies ... in those portions of the judgments dealing with the *area of personal responsibility* for international law crimes," Taylor, *supra*, at 109, *quoted in Flores*, 414 F.3d at 244 n.18. The United States Government, as amicus in this case, similarly acknowledges the role this law has played

in establishing the availability of aiding and abetting liability in modern international criminal tribunals. Brief for the United States as Amicus Curaie, at 21 n. 11.

Having been accepted as one of the core principles of the post–World War II war crimes trials, the individual criminal responsibility of those who aid and abet violations of international law was repeatedly reflected in international treaties thereafter. These treaties include major agreements addressing fundamental human rights concerns such as torture, apartheid, slavery, and genocide. *See* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4, Dec. 10, 1984, 1465 U.N.T.S. 85; International Convention on the Suppression and Punishment of the Crime of Apartheid, art. III(b), Nov. 30, 1973, 1015 U.N.T.S. 243; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, art. 6, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3; Convention on the Prevention and Punishment of the Crime of Genocide, art III(e), Dec. 9, 1948, 78 U.N.T.S. 277, 280 (hereinafter Genocide Convention). Aiding and abetting liability has also been recognized in treaties addressed to crimes of general international concern such as bribery of foreign officials in international business transactions and drug trafficking.[7] *See* Con-

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[7] The fact that some of these treaties do not directly criminalize aiding and abetting, but instead require state parties to criminalize it in their domestic law, *see, e.g.*, United Nations Convention Against Transnational Organized Crime, art. 5, G.A. Res. 55/25, at 5-6, U.N. Doc. A/RES/55/25 (Jan. 8, 2001) ("Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences ...

vention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 1 (2), Dec. 17, 1997, *reprinted in* 37 I.L.M. 1 (1998); United Nations Convention on Psychotropic Substances, art. 22 (2)(a)(ii), Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175. More recently, aiding and abetting has been included in a number of the treaties concerning organized crime and terrorism, which have become prominent concerns of the international community. *See* United Nations Convention Against Transnational Organized Crime, art. 5 (1)(b), G.A. Res. 55/25, at 5–6, U.N. Doc. A/RES/55/25 (Jan. 8, 2001) ; International Convention for the Suppression of the Financing of Terrorism, art. 2 (5)(a), opened for signature Jan. 10, 2000, 39 I.L.M. 270; International Convention for the Suppression of Terrorist Bombings, art. 2 (3)(a), May 23, 2001, 2149 U.N.T.S. 256; *see also* Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, art.5 (1)(b), G.A. Res. 55/25, at 40, U.N. Doc. A/RES/55/25 (Jan. 8, 2001). The United

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aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group."), does not limit their value as relevant sources of customary international law. Customary international law addresses "those wrongs that are of mutual, and not merely several, concern to States," *Flores*, 414 F.3d at 249 (internal quotation marks and emphases omitted), and where states join a binding agreement to enforce a mode of liability in their domestic law, that decision reflects a matter of mutual, not several, concern and is thus properly considered a subject of customary international law. *See id.* ("Matters of mutual concern between States are those involving States' actions performed towards or with regard to the other ... Matters of several concern among States are matters in which States are separately and independently interested." (citation and internal quotation marks omitted)).

Nations Security Council ("Security Council") also appears to have recognized the importance of accomplice liability in the international response to terrorism, directing states in the wake of the September 11 attacks to "[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorists acts or *in supporting* terrorists acts is brought to justice." S.C. Res. 1373, ¶ 2(e), U.N. Doc. S/RES/1373 (Sept. 28, 2001) (emphasis added).

Aiding and abetting liability continues to be recognized and enforced in international tribunals. The Statutes creating the ICTY and ICTR were adopted by resolutions of the Security Council. In their respective sections on individual criminal responsibility, both statutes impose individual liability on any person "who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of a crime. Statute of the International Tribunal for the Former Yugoslavia, art. 7, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (hereinafter ICTY Statute); Statute of the International Criminal Tribunal for Rwanda, art. 6, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (hereinafter ICTR Statute).

As with the London Charter, the recognition of aiding and abetting liability in the ICTY Statute is particularly significant because the "Individual Criminal Responsibility" section of that statute was intended to codify existing norms of customary international law. In his report to the Security Council regarding the creation of the ICTY, the Secretary-General explained that "in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be

creating or purporting to 'legislate' that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law." Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, ¶ 29, U.N. Doc. S/25704 (May 3, 1993) ("Sec'y-General Report"). Indeed, international law principles "require[d]" that the Tribunal's jurisdiction be limited to "rules of international humanitarian law which are beyond any doubt part of customary [international] law." *Id.* ¶ 34. Accordingly, the provision of aiding and abetting liability in the ICTY statute reflects a determination by both the Secretary-General and the Security Council, which approved the Secretary-General's report when it enacted the statute, that such liability is firmly established in customary international law. The inclusion of substantively identical language in the statute creating the ICTR presumably reflects a similar determination.[8]

Consistent with its statutory authorization, the ICTY has recognized and applied aiding and abetting liability for violations of international law. *See, e.g.*, *Furundzija*, Trial Chamber Judgment, ¶¶ 249, 275; *Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Cham-

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[8] The Security Council did "elect[ ] to take a more expansive approach to the choice of the applicable law" with respect to punishable violations by providing for liability for violations of Additional Protocol II and common article 3 of the Geneva Convention despite the fact that Additional article II had "not yet been universally recognized as part of customary international law," and violations of common article 3 had never before been criminalized. Report of Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955, ¶ 12, UN doc. S/1995/134 (Feb. 13, 1995). With respect to individual responsibility, though, the Security Council adhered to customary law by adopting the language used in the ICTY Statute.

ber Opinion and Judgment, ¶¶ 689–92, 730, 735, 738 (May 7, 1997). Furthermore, it has done so only after confirming that such liability was part of customary law. As the Tribunal recognized, it was required to determine "the objective basis for such individual responsibility as a matter of customary international law ... since the International Tribunal is only empowered to apply international humanitarian law that is 'beyond any doubt customary law.'" *Tadic*, Trial Chamber Opinion and Judgment, 662 (quoting Sec'y General Report ¶ 34). The Tribunal therefore conducted a probing and thoughtful analysis of international law sources in its early decisions to confirm that aiding and abetting liability is recognized in customary international law. *See Furundzija*, Trial Chamber Judgment, ¶¶ 190–249; *Tadic*, Trial Chamber Opinion and Judgment, ¶¶ 661–91.

More recently, the Rome Statute of the International Criminal Court ("Rome Statute"), July 17, 1998, 2187 U.N.T.S. 90, provides that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the ICC if that person:

> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; [or]
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime[.]

*Id.* art. 25 (3)(c), (d). The Rome Statute is particularly significant for the present inquiry because, unlike other sources of international legislation, it articulates the *mens rea* required for aiding and abetting liability. The Statute makes clear that, other than assistance rendered to the commission of a crime by a group of persons acting with a common purpose, a defendant is guilty of aiding and abetting the commission of a crime only if he does so "[f]or the purpose of facilitating the commission of such a crime." *Id.* art. 25 (3)(c).

In drawing upon the Rome Statute, I recognize that it has yet to be construed by the International Criminal Court; its precise contours and the extent to which it may differ from customary international law thus remain somewhat uncertain. Nevertheless, the Statute has been signed by 139 countries and ratified by 105, including most of the mature democracies of the world.[9] It may therefore be taken "by

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[9] The United States has not ratified the Rome Treaty for reasons unrelated to any concern over the definition of aiding-and-abetting. *See* Brief for the United States as Amicus Curiae, at 24 n. 14; *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 339–40 (S.D.N.Y. 2005)

and large ... as constituting an authoritative expression of the legal views of a great number of States." *Furundzija*, Trial Chamber Judgment, ¶ 227.

Furthermore, the Rome Statute's *mens rea* standard is entirely consistent with the application of accomplice liability under the sources of international law discussed above.[10] For example, in the *Ministries Case* conducted under Control Council Law No. 10, the tribunal declined to impose criminal liability on a bank officer who was alleged to have "made a loan, knowing or having good reason to believe that the borrower w[ould] use the funds in financing enterprises [conducted] in violation of either national or international law," but was not proven to have made the loan with the purpose of facilitating the enterprises' illegal activities.[11] *United States v. von*

("[T]he United States feared 'unchecked power in the hands of the prosecutor' that could lead to 'politicized prosecution.'"). Indeed, the Amicus Brief appears to endorse the elements set out in Article 25(3). Brief for the United States as Amicus Curaie, at 26.

[10] The same standard was also adopted by the United Nations Transitional Administration in East Timor ("UNTAET"). *See* UNTAET Reg. No. 2000/15 § 14.3(c).

[11] There are occasions when this intent could be inferred from such sales. In *Direct Sales Co. v. United States*, 319 U.S. 703 (1943), the Supreme Court held that the sale of restricted goods with an inherent capacity for harm, such as the opiates involved in that case, combined with other factors, may be sufficient to prove that the seller was engaged in a conspiracy with the buyer. *Id.* at 711. Nevertheless, it observed that "not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy." *Id.* at 712. For example, the Court held that a conspiracy charge might not lie against a company engaged in a "continuous course of sales, made either with strong suspicion of the buyer's wrongful use or with knowledge, but without stimulation or active incitement

*Weizsaecker (The Ministries Case), in* 14 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* 308, 622 (William S. Hein & Co., Inc. 1997) (1949). Meanwhile, those who assist in the commission of a crime with the purpose of facilitating that crime would be subject to aiding and abetting liability under the statutes governing the ICTY and ICTR.[12] My research has revealed no source of international law that recognizes liability for aiding and abetting a vio-

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to purchase." *Id.* at 712 n.8. On the other hand, sales of unlimited quantities stimulated "by all the high-pressure methods, legal if not always appropriate in the sale of free commodities," *id.* at 712, would suffice to support such a charge. Another example that would suffice is the *Zyklon B* case, *Trial of Bruno Tesch and Two Others, in* 1 *Law Reports of War Criminals* 93 (William S. Hein & Co., Inc. 1997) (1946), where the principal defendant not only supplied prussic acid to the S.S. but undertook to train its members how it could be used to kill human beings. *Id.* at 95.

[12] These Tribunals would also extend liability to individuals who merely had "knowledge that [their] acts assist the commission of the specific crime of the principal." *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Appeals Chamber Judgment, ¶ 102 (ii) (Feb. 25, 2004). Any individual who acts with the purpose to facilitate the commission of a crime would necessarily act with such knowledge. Thus, I do not view the articulation of a broader definition by the ICTY as detracting from my position that liability in accordance with the purposefulness standard is well-established and universally recognized under international law. The critical question is whether there is a discernable core definition that commands the same level of consensus as the 18th-century crimes identified by the Supreme Court in *Sosa*. *See Sosa*, 542 U.S. at 732. I believe that the standard I adopt is such a definition. *Cf. United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820) (noting that "whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, animo furandi, is piracy").

lation of international law but would not authorize the imposition of such liability on a party who acts with the purpose of facilitating that violation (provided, of course, that the *actus reus* requirement is also satisfied).

With respect to the *actus reus* component of the aiding and abetting liability, the international legislation is less helpful in identifying a specific standard. However, in the course of its analysis of customary international law, the ICTY concluded that "the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a *substantial effect* on the perpetration of the crime." *Furundzija*, Trial Chamber Judgment, ¶ 235 (second emphasis added). My research has uncovered nothing to indicate that a standard other than "substantial assistance" should apply.

Accordingly, I conclude that a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime. Furthermore, based on this review of international law's treatment of aiding and abetting liability over the past sixty years, I conclude that aiding and abetting liability, so defined, is sufficiently "well-established[ ] [and] universally recognized" to be considered customary international law for the purposes of the ATCA. *See Kadic*, 70 F.3d at 239 (internal quotation marks omitted). This conclusion comports with the decisions of several other federal courts that have

considered the issue.[13] *See Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 287 (E.D.N.Y. 2007) (noting the "vast body of law finding aiding and abetting liability available under the [ATCA]"); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006) ("Aiding and abetting liability is a specifically defined norm of international character that is properly applied as the law of nations for purposes of the [ATCA]."); *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 WL 2455752, *3–4 (N.D. Cal. Aug. 22, 2006); *In re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 52–54 (E.D.N.Y. 2005).

C.

While I conclude that, at present, only aiding and abetting liability imposed in accordance with the standard outlined above is sufficiently well-established and universally recognized under international law to trigger jurisdiction under the ATCA, I appreciate that this definition is not necessarily set in stone. International law, like our domestic law, can change, and the ATCA was intended to change along with it. *See Sosa*, 542 U.S. at 728 (noting Congress's intention in passing the TVPA that the ATCA "'remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law'" (quoting H.R. Rep. No. 102-367, pt. 1, p. 3 (1991)); *see also id.* at 725 (articulating the standard for courts hearing "any claim based on the *present-day* law of nations"

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[13] In light of this conclusion, I need not address the plaintiffs' argument that a theory of aiding and abetting liability could be supplied by domestic federal common law even if such liability did not exist under international law.

(emphasis added)). In this regard, I note that there is some support, principally in tribunal decisions from the ICTY and ICTR, for a definition of aiding and abetting that would lead to liability where an individual provides substantial assistance with "the knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal."[14] *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Appeals Chamber Judgment, ¶102 (i)–(ii) (Feb. 25, 2004); *see also Furundzija*, Trial Chamber Judgment, ¶¶ 249, 275; *Tadic*, Trial Chamber Opinion and Judgment, ¶¶689–92, 730, 735, 738.

To be sure, I acknowledge limitations on the extent to which we may rely on the decisions of the ICTY and ICTR for the present purposes.[15] Those decisions arise out of completely distinct factual contexts and often involve defendants who might have been convicted on alternate theories of liability. Moreover, as a scholar and participant in the ICTY

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[14] The Appeals Chamber, which is shared by both the ICTY and the ICTR, has made clear that the same law relating to modes of liability applies in both Tribunals. *See Prosecutor v. Ntakirutimana*, Case Nos. ICTR-96-10-A, ICTR-96-17-A, Appeals Chamber Judgment, ¶ 468 (Dec. 13, 2004) ("Given the fact that both the ICTY and the ICTR have mirror articles identifying the modes of liability by which an individual can incur criminal responsibility, the Appeals Chamber is satisfied that the jurisprudence of the ICTY should be applied to the interpretation of Article 6(1) of the ICTR Statute.").

[15] I note a possible tension in the tribunals' definition aiding and abetting under which the necessary *mens rea* is knowing assistance, *Vasiljevic*, Appeals Chamber Judgment, ¶ 102(ii), yet requires that the act of assistance be "specifically directed to assist ... the perpetration of a specific crime," *id.* ¶ 102(i). I express no view on how, if at all, this possible tension might be resolved.

noted, panels of that Tribunal occasionally (and consciously) engaged in discussions "peripheral to the *ratio decidendi* of a case" in order to provide "clarification [that] might have some value for the future development of international criminal law." Antonio Cassese, *The ICTY: A Living and Vital Reality*, 2 J. Int'l Crim. Just. 585, 589–90 (2004). Such clarification through dicta can be useful and is not necessarily without justification. *See id.* at 590 ("[T]he absence of an international law-maker and an international court with compulsory universal jurisdiction entails that many rules are not clear, particularly when they are of customary origin, and are thus open to differing interpretations—hence the need for courts gradually to spell out the contents of those rules, if need be through *obiter dicta*."); *see also* 1 Oppenheim's International Law: Peace 41 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (noting that "in view of the difficulties surrounding the codification of international law," international tribunals are expected to "fulfil, inconspicuously but efficiently, a large part of the task of developing international law"). But it "may also prove simply academic and sometimes also misleading for future courts pronouncing on the same matters." Cassese, *supra*, at 590.

Nevertheless, the opinions of the ICTY and ICTR provide evidence of the state of customary international law. As a leading treatise explains, "decisions of international tribunals ... exercise considerable influence as an impartial and considered statement of the law by jurists of authority in light of actual problems which arise before them." 1 Oppenheim's, *supra*, at 41; *see also* Ian Brownlie, Principles of Public International Law at 19 (noting that "the practical significance of the label 'subsidiary means' in Article

38(1)(d) is not to be exaggerated"). The ICTY has been specifically recognized as having provided "a number of significant findings on issues of law." Brownlie, *supra*, at 23; *see also* Cassese, *supra*, at 59 1–93 (arguing that the ICTY "clarified the contours of many notions of international criminal law," including "the notion of aiding and abetting"); *cf. Sosa*, 542 U.S. at 734 ("'[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.'" (quoting *The Paquete Habana*, 175 U.S. at 700) (alteration in original)). While I am unable to find that liability predicated on the definition of aiding and abetting offered in the decisions of the ICTY and ICTR is sufficiently well-established and universally recognized to trigger jurisdiction for a tort suit under the ATCA, particularly in light of the higher standard articulated in the Rome Statute, I am mindful of the conclusions of these tribunals.[16]

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[16] I note further that other federal courts have consulted decisions of the ICTY and ICTR in determining whether various rules are part of customary international law. *See, e.g., Hamdan*, 126 S.Ct. at 2785 n. 40 (ICTY); *Sosa*, 542 U.S. at 762 (Breyer, J. concurring) (ICTY); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1290–93 (11th Cir. 2002) (ICTY and ICTR); *Tagaga v. INS*, 228 F.3d 1030, 1035 n.10 (9th Cir. 2000) (ICTY); *Almog*, 471 F. Supp. 2d at 286 (noting that "[s]tandards for imposing liability where a non-primary actor is alleged to be liable for a violation of the law of nations emerge from," in part, the ICTY and ICTR case law); *Presbyterian Church of Sudan*, 453 F. Supp. 2d at 666–68 (analyzing ICTY cases to determine the elements of aiding and abetting liability under interna-

D.

1.

Judge Korman argues that it is insufficient to inquire whether aiding and abetting is generally recognized under customary international law and that the appropriate inquiry is instead to engage in a "norm-by-norm analysis" to determine whether aiding and abetting liability exists for the violation of a particular rule. Opinion of Judge Korman at 134. Yet this is not how the inquiry is undertaken by international tribunals whose jurisdiction is limited by customary international law.

In *Tadic*, the Appeals Chamber of the ICTY considered whether a defendant could be held criminally responsible under international law on a common purpose or joint criminal enterprise (JCE) theory of liability. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 185 (July 15, 1999). After concluding that the ICTY Statute permitted such liability, the tribunal turned to customary law.[17] The Appeals Chamber reviewed relevant sources of customary law including case law from post–World War II war crimes cases, international treaties, and the domestic law of many countries. It then concluded that "the notion of common design as

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tional law); *In re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d at 54 (same); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1356 (N.D. Ga. 2002).

[17] *See Prosecutor v. Milutinovic*, Case No. IT-99–37-AR72, Appeals Chamber Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - *Joint Criminal Enterprise*, ¶ 17 (May 21, 2003) (noting that each chamber has a "duty to ascertain that a ... form of liability charged in the indictment is both provided for under the Statute and that it existed at the relevant time under customary international law.").

a form of accomplice liability is firmly established in customary international law." *Id.* ¶ 220. The Appeals Chamber made no effort, though, to distinguish among the different crimes (or even broad categories of crimes) over which it had jurisdiction or to verify the existence of JCE liability at customary law for each individual crime. Later panels have confirmed that Tadic's review of "state practice and *opinio juris* ... was sufficient" to establish that "such a norm existed under customary international law." *Prosecutor v. Milutinovic*, Case No. IT99–37-AR72, Appeals Chamber Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - *Joint Criminal Enterprise*, 29 (May 21, 2003); *see also Prosecutor v. Brdjanin*, Case No. IT-99-36-A, Appeals Chamber Judgment, ¶ 363 (Apr. 3, 2007).

These tribunals took the same approach with respect to the application of aiding and abetting liability. In *Tadic*, the ICTY trial chamber viewed international treaties and trials following the Second World War as "establish[ing] the basis in customary international law for both individual responsibility and of participation in the various ways provided by Article 7 of the [ICTY] Statute." *Tadic*, Trial Chamber Opinion and Judgment, ¶ 669. In *Furundzija*, the trial chamber consulted post–World War II case law, as well as modern authoritative international instruments, to "establish the content" of aiding and abetting liability under customary international law. *Furundzija*, Trial Chamber Judgment, ¶¶ 191, 195–231. In neither case did the Tribunal engage in the norm-specific inquiry advocated by Judge Korman. Indeed, the *Furundzija* Trial Chamber concluded that "[t]he definitions and propositions concerning aiding and abetting [it] enunciated ... apply ... to all crimes," even though it had not purported to identify

sources relating to every crime over which it had jurisdiction. *Id.* ¶ 250. Yet these analyses are recognized as authoritative by other chambers of the Tribunals. *See, e.g.*, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals Chamber Judgment, ¶ 162 (Mar. 24, 2000) (noting that "[t]he liability of a person charged with aiding and abetting another person in the commission of a crime was extensively considered by Trial Chamber II in the *Furundzija* Judgment" and adopting its conclusions); *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Chamber Judgment, ¶ 32 n.22 (June 7, 2001) (citing *Tadic* for discussion of "the customary nature of the[ ] principles" of aiding and abetting liability).

The international tribunals' approach is consistent with the understanding that aiding and abetting is a theory of liability for acts committed by a third party. As we have recognized in our domestic criminal law, "aiding and abetting 'does not constitute a discrete criminal offense but only serves as a more particularized way of identifying persons involved'" in the underlying offense. *United States v. Smith*, 198 F.3d 377, 383 (2d Cir. 1999) (quoting *United States v. Oates*, 560 F.2d 45, 54 (2d Cir. 1977) (internal quotation marks omitted)); *see also Hefferman v. Bass*, 467 F.3d 596, 601 (7th Cir. 2006) (explaining that "aiding and abetting is a theory for holding the person who aids and abets liable for the tort itself"). International law is consistent with domestic law on this point. *See, e.g.*, *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment, ¶ 391 (Feb. 22, 2001) ("As opposed to the 'commission' of a crime, aiding and abetting is a form of accessory liability."); *Akayesu*, Trial Chamber Judgment, ¶ 527 (defining an accomplice as "someone who associates himself in an offence committed by an-

other"); *see also Hamdan*, 126 S. Ct. at 2785 n.40 ("The International Criminal Tribunal for the former Yugoslavia (ICTY), drawing on the Nuremberg precedents, has adopted a 'joint criminal enterprise' theory of liability, but that is a species of liability for the substantive offense (akin to aiding and abetting), not a crime on its own."). Because aiding and abetting is a generally applicable means of identifying who should be held responsible for a particular act, rather than a necessary element of the act itself, it is more reasonable to consider whether the theory is accepted as a general principle of customary international law than to ask whether each substantive norm that proscribes a specific conduct encompasses liability for aiding and abetting. *See, e.g.*, Rome Statute (including the provision on individual criminal responsibility in "Part III: General Principles of Criminal Law" and the definition of the substantive offenses in Part II); ICTR Statute (segregating the article defining individual criminal responsibility from the articles describing the substantive offenses); ICTY Statute (same); Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-eighth session, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996) (including the article on individual responsibility in "Part One: General Provisions" and the definitions of crimes in "Part Two: Crimes Against the Peace and Security of Mankind").

2.

Viewing aiding and abetting in this way, as a theory of identifying who was involved in an offense committed by another rather than as an offense in itself, also helps to explain why a private actor may

be held responsible for aiding and abetting the violation of a norm that requires state action or action under color of law. It is true, as we held in *Kadic*, that "certain forms of conduct" violate the law of nations only when undertaken by state actors or those acting under color of law. *Kadic*, 70 F.3d at 239. But imposing liability on private actors who aid and abet such conduct does not, contrary to Judge Korman's suggestion, detract in any way from this requirement. Indeed, the imposition of aiding and abetting liability under international law requires "a predicate offence committed by someone other than the accomplice," in this case, a state actor or someone acting under color of law. *Akayesu*, Trial Chamber Judgment, ¶ 529. Recognizing the responsibility of private aiders and abettors merely permits private actors who substantially assist state actors to violate international law and do so for the purpose of facilitating the unlawful activity to be held accountable for their actions.

It is of no moment that a private actor could be held liable as an aider and abettor of the violation of a norm requiring state action when that same person could not be held liable as a principal. In our domestic law, it is "well settled that one may be found guilty of aiding and abetting another individual in his violation of a statute that the aider and abettor could not be charged personally with violating." *In re Nofziger*, 956 F.2d 287, 290 (D.C. Cir. 1992); *see also United States v. Tannenbaum*, 934 F.2d 8, 14 (2d Cir. 1991) ("The fact that the accused does not possess the legal capacity to commit the substantive offense does not mean that he cannot be convicted ... of aiding and abetting the commission of the substantive offense by another. Thus, the inability to commit the substantive offense is immaterial." (citations omit-

ted)). Indeed, "[t]he doctrine is of ancient origin." *Nofziger*, 956 F.2d at 291. International law, too, recognizes that criminality is assessed by reference to the actions of the principal, not the aider and abettor. *See Akayesu*, Trial Chamber Judgment, ¶ 528 ("[I]t should be understood that the physical act which constitutes the act of complicity does not have its own inherent criminality, but rather it borrows the criminality of the act committed by the principal perpetrator of the criminal enterprise. ... The accomplice has not committed an autonomous crime, but has merely facilitated the criminal enterprise committed by another.").

The defendants and the government argue that the Supreme Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), precludes us from recognizing aiding and abetting liability for claims brought under the ATCA because "where Congress has not explicitly provided for aider and abettor liability in civil causes of action, it should not be inferred." *See In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 550. The Court's holding in *Central Bank* was primarily premised on a recognition that § 10(b) does not prohibit aiding and abetting, and "the private plaintiff may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of § 10(b)." *Central Bank*, 511 U.S. at 173. Here, however, the ATCA provides jurisdiction for the courts to hear torts "committed in violation of the law of nations." The Supreme Court's instruction in *Central Bank* that "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors," 511 U.S.

at 182, is thus inapposite. Under the ATCA, the relevant norm is provided not by domestic statute but by the law of nations, and that law extends responsibility for the violations of its norms to aiders and abettors. *See* William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 Rutgers L.J. 635, 650 (2006) (noting that "[t]he precise holding in *Central Bank* . . . does not translate easily to [ATCA] litigation," and that "at a fundamental level" *Central Bank* in fact suggests that a theory of aiding and abetting liability may be recognized if "a norm of international law forbids private persons to assist violators"). Thus, I conclude that customary international law recognizes liability for aiding and abetting violations of international law, and that the district court erred when it reached the contrary conclusion.

3.

Judge Korman further argues that the defendants cannot be held liable as aiders and abettors because the sources that establish accessorial liability do not extend that liability to corporations. Opinion of Judge Korman at 118. This argument was not raised by the defendants on appeal and therefore the issue was not briefed by the parties. It is perhaps not surprising that neither the defendants nor the United States raised this issue as a bar to liability: We have repeatedly treated the issue of whether corporations may be held liable under the ATCA as indistinguishable from the question of whether private individuals may be. *See Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447 (2d Cir. 2000) (asking "whether Coca-Cola can have violated 'the law of nations' if it acted solely as a non-governmental entity"); *see also Flores*, 414 F.3d at 244 (making no distinction between pri-

vate individuals and corporations and noting that "certain activities are of 'universal concern' and therefore constitute violations of customary international law not only when they are committed by state actors, but also when they are committed by private individuals" (citing *Kadic*, 70 F.3d at 239–40)); *cf. Sosa*, 542 U.S. at 732 n.20 (classifying both corporations and individuals as "private actor[s]"). Regardless, because the defendants have not objected to the imposition of liability on this basis, we need not reach the issue at this time.

**E.**

The Ntsebeza and Digwamaje Plaintiffs argue that the district court also erred in focusing on whether allegations of accessorial liability would support jurisdiction under the ATCA because they also brought claims of direct liability. To the extent that the court did confront these direct liability claims, it appears to have rejected them either on the ground that the plaintiffs failed to allege state action or on the ground that the treaties upon which the claims were based were not self-executing and therefore could not satisfy the ATCA's jurisdictional prerequisite. Both of these bases appear to rest on misunderstandings of our ATCA jurisprudence.

First, it appears that the district court did not distinguish between norms of international law that apply only to state actors and those norms that proscribe conduct even when not taken under the color of law. For example, the district court held that the plaintiffs in this case "do not allege actions by the defendants that elevate them to the status of state actors in the commission of torture, genocide, killings, and other serious crimes." *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 548–5 9. As we squarely

held in *Kadic*, however, "the proscription of genocide [by customary international law] has applied equally to state and non-state actors," and "acts of rape, torture, and summary execution . . . are actionable under the [ATCA], without regard to state action, to the extent that they were committed in pursuit of genocide or war crimes." 70 F.3d at 242, 244. It is therefore not relevant whether the plaintiffs sufficiently allege that the defendants acted under color of law in the commission of genocide as long as they sufficiently allege that the defendants committed genocide.

Second, I believe that the district court overstated the weight we have placed on the self-executing status of a treaty in our consideration of its weight as evidence of customary international law. In *Flores*, we explained that "a treaty that is self-executing or that has been executed through an Act of Congress—and therefore gives rise to rights legally enforceable in our courts—provides greater evidence of the customs and practices of the United States than a treaty that has not been executed." 414 F.3d at 257. We did not hold that non-self-executing treaties are without any evidentiary value with regard to the state of current customary international law, much less that "no liability based upon any alleged violation of the[] norms [articulated in such treaties] can form an adequate predicate for jurisdiction under the ATCA." *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 552. Indeed, in *Kadic* we relied on the Genocide Convention to determine the shape of the international proscription of genocide and made clear that "the legislative decision not to create a new private remedy does not imply that a private remedy is not already

available under the [ATCA]."[18] *Kadic*, 70 F.3d at 241–42. The relevant inquiry for establishing jurisdiction under the ATCA, as our case law makes clear, is whether the conduct alleged by the plaintiffs violates a norm "that States universally abide by, or accede[] to, out of a sense of legal obligation and mutual concern." *Flores*, 414 F.3d at 248. Whether a treaty that embodies that norm is self-executing is relevant to, but is not determinative of, that question.

III

For the foregoing reasons, I join in the per curiam opinion.

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[18] Apparently recognizing that the Genocide Convention may be used to support the existence of genocide as a violation of the law of nations, Judge Korman nonetheless suggests that the district court should not recognize a cause of action for genocide because "Congress has quite plainly indicated its intention that such a cause of action should not be available" through its passage of the Genocide Convention Implementation Act, 18 U.S.C. § 1091. Opinion of Judge Korman at 116–17; *see also* 18 U.S.C. § 1092 (providing that nothing in the Act should be "construed as creating any substantive or procedural right enforceable by law by any party in any proceeding"). It is unnecessary to resolve this issue as part of the jurisdictional analysis, and I would leave it to the district court to address in the first instance should it undertake to decide whether to recognize a cause of action.

Hall, *Circuit Judge*, concurring:

As reflected in the per curiam opinion, I agree with Judge Katzmann with respect to the ultimate disposition of this appeal. The district court erred when it ruled that it lacked jurisdiction under the ATCA to determine plaintiffs' claims based on defendants' accessorial liability. In ruling that it lacked subject matter jurisdiction under the ATCA, the district court required that "aiding and abetting international law violations [be] itself an international law violation that is universally accepted as a legal obligation." *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 549 (S.D.N.Y. 2004). In other words, the district court assumed that a federal court must look to international law to divine not only the applicable primary violation of international law cognizable under the ATCA, but also the standard for aiding and abetting liability. The district court went on to conclude that aiding and abetting liability did not exist as a matter of customary international law and thus that federal subject matter jurisdiction did not lie. This conclusion was error. As *Sosa* makes clear, a federal court must turn to international law to divine standards of primary liability under the ATCA. To derive a standard of accessorial liability, however, a federal court should consult the federal common law.

## I

### A

We begin with the text. In its entirety, the ATCA provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in

> violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350. The First Congress enacted the statute as part of the Judiciary Act of 1789. Over the course of the last 200-odd years, the text of the statute has changed only slightly, but "little is known of the framers' intentions in adopting it—the legislative history of the Judiciary Act does not refer to section 1350." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 304 (S.D.N.Y. 2003). Few parties invoked the ATCA until our decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which heralded the modern era of ATCA litigation. But from the very beginning, the ATCA's straightforward text belied complex and controversial problems of exegesis and praxis. Struggling with these problems in the wave of litigation that followed *Filartiga*, we observed that "neither Congress nor the Supreme Court ha[d] definitively resolved the complex and controversial questions regarding the meaning and scope of the ATCA." *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 247 (2d Cir. 2003).

One year later, in an attempt to clarify the problems posed by the ATCA, the Supreme Court issued *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Principally, *Sosa* resolved that the ATCA was not "a jurisdictional convenience to be placed on the shelf for use by a future Congress ... that might, someday, authorize the creation of causes of action." *Id.* at 719. Instead, the ATCA recognizes "claim[s] based on the present-day law of nations" so long as they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms." *Id.* at 725.

B

In their complaints, the plaintiffs make claims that rest on such norms "defined with a specificity comparable to the features of the 18th-century paradigms." The allegations include genocide, torture, cruel and degrading treatment, systematic racial discrimination, forced removals, and various other avowed crimes against humanity. In essence, the plaintiffs assert that apartheid itself is a crime against humanity,[1] on a par with genocide[2] and slav-

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[1] The Charter of the International Military Tribunal (Nuremberg Tribunal) describes crimes against humanity as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

Charter of the International Military Tribunal, art. 6(c), in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, E.A.S. No. 472.

[2] The Genocide Convention defines genocide as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Jan. 12, 1951, 78 U.N.T.S. 277.

Notably, the Apartheid Convention echoes the definition of genocide, in that it applies to "murder of members of a racial group or groups," "the infliction upon the members of a racial

ery, and that the depredations of the apartheid system (such as torture, sexual assault, extrajudicial killing, and forced labor) were perpetrated in the course of genocide and crimes against humanity. In their brief and at oral argument, the corporations did not contest that such allegations reflected violations of customary international law.[3] Though their complaints are not models of precision, the plaintiffs, if given the opportunity to replead, likely would allege primary violations of international law cognizable under the ATCA.

C

In addition to its delineation of the standard by which federal courts derive primary violations of international law, the *Sosa* opinion contains numerous dicta. In his concurring opinion, Judge Katzmann thoroughly summarizes these dicta. It remains inescapable, however, that *Sosa* at best lends Delphian guidance on the question of whether the federal common law or customary international law represents the proper source from which to derive a standard of aiding and abetting liability under the ATCA. Lacking the benefit of clear guidance, I presume a

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group or groups of serious bodily or mental harm," and the "[d]eliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part." Convention on Apartheid, art. 2, Nov. 30, 1973, 1015 U.N.T.S. 243.

[3] At oral argument, counsel for the corporations added that he did not accept the premise that the plaintiffs had actually pled those allegations, as the complaints did not allege that particular plaintiffs suffered particular injuries at the hands of specific South African officials whom the corporations aided and abetted in a specific way at a specific time and place. As reflected in the per curiam opinion, plaintiffs may have an opportunity to replead these violations with greater specificity on remand.

federal court should resort to its traditional source, the federal common law, when deriving the standard. Because I find that federal common law provides a standard by which to assess aiding and abetting liability, I do not address the alternative argument that such a standard may be derived from international law.[4]

It is a "hornbook principle that international law does not specify the means of its domestic enforcement." Brief for the International Law Scholars as Amici Curiae at 5–6; *see also* Brief for the United States of America as Amicus Curiae at 5 ("[A]lthough the substantive norm to be applied is drawn from international law or treaty, any cause of action recognized by a federal court is one devised as a matter of federal common law."). As Judge Edwards has explained, "the law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring); *see also Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) ("The law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations."); *Xuncax v. Gramajo*, 886 F. Supp. 162, 180 (D. Mass. 1995) ("While it is demonstrably possible for nations

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[4] I note that Judge Katzmann, in his concurring opinion, declines to address whether federal common law provides a standard by which to determine aiding and abetting liability in this case. Opinion of Judge Katzmann at 39 n.12. It is thus left to a future panel of this Court to determine whether international or domestic federal common law is the exclusive source from which to derive the applicable standard.

to reach some consensus on a binding set of principles, it is both unnecessary and implausible to suppose that, with their multiplicity of legal systems, these diverse nations should also be expected or required to reach consensus on the types of actions that should be made available in their respective courts to implement those principles."); Restatement (Third) of Foreign Relations Law § 703 cmt. c ("In general, individuals do not have direct international remedies against a state violating their human rights except where such remedies are provided by international agreement. Whether they have a remedy under the law of a state depends on that state's law." (internal citation omitted)); Beth Stephens, Sosa v. Alvarez-Machain: *"The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 Brook. L. Rev. 533, 558 (2004) ("*Sosa* does not require that every ancillary rule applied in an AT[CA] case meet the level of international consensus required for the definition of the underlying violation. As in any case in which the federal courts exercise discretion to recognize federal common law, the courts will fashion rules to fill gaps, borrowing from the most analogous body of law.").

Numerous international law scholars have described this principle. *See* L. Henkin, Foreign Affairs and the Constitution 224 (1972); Oppenheim, 1 International Law 44–46 (8th ed. 1955); L. Henkin, R. Pugh, O. Schachter & H. Smit, International Law 116 (1980); 4 Blackstone's Commentaries 72 (Welsby ed., 1854) (noting that the law of nations recognized certain universal offenses but that accessorial liability is made available "by statute"). As amicus International Law Scholars persuasively argue, these "means of domestic enforcement" encompass at least some theories of accessorial liability, including aiding

and abetting. Brief for International Law Scholars as Amici Curiae at 6. I believe our Court should stand by this principle. Moreover, when international law and domestic law speak on the same doctrine, domestic courts should choose the latter. Oppenheim, *supra*, at 44–46. This, too, is a principle our Court should respect. Here, customary international law and the federal common law both include standards of aiding and abetting. In a situation such as this, I opt for the standard articulated by the federal common law.

Supreme Court precedent commands the same result. As Judge Reinhardt noted when concurring in *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), the ATCA is silent "as to what body of law applies to ancillary issues that may arise, such as whether a third party may be held liable in tort" for a violation of international norms. *Id.* at 965 (Reinhardt, J., concurring). Typically, federal courts look to the federal common law to fill such an interstice. *Id.* at 966 (citing *United States v. Kimbell Foods*, 440 U.S. 715, 727 (1979)); *see also Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (stating that courts should apply the federal common law "in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations"). Until the Supreme Court provides us more explicit guidance regarding accessorial liability than it has to date, I remain convinced that our federal common law embodies a clearly extant standard of aiding and abetting liability. *See Unocal*, 395 F.3d at 967. It is to this standard that federal courts should resort and to which I now turn.

The Supreme Court has described *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), as "a comprehensive opinion on the subject [of aiding and abetting]." *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 181 (1994). *Halberstam* relied heavily upon the Restatement (Second) of Torts to set the parameters of aiding and abetting liability. Section 876(b) of the Restatement provides: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he ... (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." Based on the Restatement, *Halberstam* held that aiding and abetting included three elements:

> (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.

*Halberstam*, 705 F.2d at 477. The *Halberstam* Court then adopted and applied the factors enumerated in § 876 to assess whether the defendant's encouragement or assistance was sufficiently substantial to support liability. "The Restatement suggests five factors in making this determination: 'the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other tortfeasor and his state of mind.'" *Id.* at 478 (quoting Restatement (Sec-

ond) of Torts § 876 cmt. d) (alteration omitted). In the almost quarter-century since *Halberstam* was decided, many state courts and Circuit Courts, including the Second Circuit, have adopted the Restatement's aiding and abetting standard. Following the lead of the *Halberstam* Court, I believe that § 876 provides the proper standard under which to assess whether a particular defendant may be held liable for aiding and abetting a primary violation of international law.[5] I also agree with the *Halberstam*

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[5] I agree with Judge Katzmann that *Central Bank*, 511 U.S. at 164, poses no bar to finding aiding and abetting liability under the ATCA, albeit for a different reason. In *Central Bank*, the Supreme Court held that the Securities Acts of 1933 and 1934 did not encompass aiding and abetting liability. 511 U.S. at 171. Noting that the Acts provided for some forms of "indirect" liability, the Supreme Court reasoned that "Congress knew how to impose aiding and abetting liability when it chose to do so." *Id.* at 176. This same reasoning cannot apply to the ATCA, whose textual brevity and dearth of legislative history leave us with inconclusive evidence of Congress's intent to include or exclude aiding and abetting liability. It would appear, however, that the Founding Generation nevertheless understood the ATCA encompassed aiding and abetting liability. For example, in Attorney General Bradford's 1795 opinion, *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795), he opined that the ATCA allowed civil suits for damages for those who had "taken part" in violating international law. *Sosa*, 542 U.S. at 721. In fact, Bradford's opinion specifically covered those American citizens who "voluntarily joined, conducted, *aided and abetted*" the French fleet in their attack on a British settlement. *Breach of Neutrality*, 1 Op. Att'y Gen. at 58 (emphasis added). Attorney General Bradford furthermore referred to an April 1793 Proclamation issued by George Washington which declared that "all those who should render themselves liable to punishment under the laws of nations, by committing, aiding or abetting hostilities" against the merchants of foreign nations at peace with the United States would not receive the protection of the United States. *Id.* at 59. Cases from that era, moreover, indicate that

Court that "a person who assists a tortious act may be liable for other reasonably foreseeable acts done in connection with it." *Id.* at 484.

Under a proper application of § 876 to ATCA civil aiding and abetting claims, liability should be found only where there is evidence that a defendant furthered the violation of a clearly established international law norm in one of three ways: (1) by knowingly and substantially assisting a principal tortfeasor, such as a foreign government or its proxy, to commit an act that violates a clearly established international law norm; (2) by encouraging, advising, contracting with, or otherwise soliciting a principal tortfeasor to commit an act while having actual or constructive knowledge that the principal tortfeasor will violate a clearly established customary international law norm in the process of completing that act; or (3) by facilitating the commission of human rights violations by providing the principal tortfeasor with the tools, instrumentalities, or services to commit those violations with actual or constructive knowledge that those tools, instrumentalities, or services will be (or only could be) used in connection with that purpose.

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secondary liability was recognized as an established part of the federal common law. *See Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795) (holding a defendant liable for aiding the unlawful capture of a neutral ship and ordering restitution); *Henfield's Case*, 11 F. Cas. 1099, 1103 (C.C.D. Pa. 1793) (Chief Justice John Jay) (charging a grand jury that United States citizens may be held liable under the laws of the United States for "committing, aiding or abetting hostilities" in violation of the law of nations); *see also* Congress's Act of April 30, 1790, 1 Stat. 114 (1790) (deeming "an accessary [sic] to ... piracies" anyone who "knowingly and willingly aid[ed]" piracy).

All members of this panel understand that corporations must transact business in a less than perfect world. I do not understand defendants to argue, however, that business imperatives require a license to assist in violations of international law. Rather, I understand defendants to express the concern that the recognition of ATCA aiding and abetting liability could expose corporations to liability for merely doing business in countries with repressive regimes or for participating in activities that, with twenty-twenty hindsight, can be said to have been indirectly linked to human rights abuses. I share Judge Katzmann's understanding, however, that private parties and corporate actors are subject to liability under the ATCA. I therefore concur in Part II.D.2 of Judge Katzmann's opinion to the extent that it recognizes the general legal principle that aiding and abetting liability obtains even where the culpable actor is incapable of violating the relevant legal norm as a principal, and I concur in Part II.D.3 of his opinion in full. Defendants raise important concerns about such liability, but those concerns do not counsel in favor of the per se rejection of corporate liability, private party liability, and aiding and abetting liability under the ATCA. Instead, they require the narrow and careful extension of such liability to cases in which a defendant played a knowing and substantial role in the violation of a clearly recognized international law norm. Furthermore, the collateral consequences predicted by defendants and the dissent remain relevant considerations when making these judgments, as the common law nature of the inquiry allows for a limited but meaningful consideration of the practical consequences of extending ATCA liability in the context of each particular case.

Because I intend aiding and abetting liability to attach only in this limited way, I think it helpful to provide examples illustrating the three ways in which I believe a defendant may incur liability for aiding and abetting violations of customary international law. The first type of aiding and abetting liability is designed to capture the case of a principal tortfeasor who seeks assistance from a defendant to commit an act that violates international law norms, such as the extrajudicial killing of an opposition political figure. The second is designed to cover circumstances where the alleged aider and abettor is accused of having purchased security services with the knowledge that the security forces would, or were likely to, commit international law violations in fulfilling their mandate. The allegations raised in the cases of *Unocal*, 395 F.3d 932, and *Wiwa v. Royal Dutch Petroleum Co.*, No. 96-Civ-8386, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002), would be reached by this prong. In *Unocal*, the alleged aider and abettor corporation was accused of having purchased security services from a military government to further develop its oil operations, with the knowledge that the security forces would likely commit international law violations in fulfilling this mandate. 395 F.3d at 938–42. In *Wiwa*, the plaintiffs alleged that the defendants directed and aided government security forces in violating plaintiffs' rights by providing logistical support, transportation, and weapons to government security forces to ensure that the corporation's business activities could proceed "as usual." *Wiwa*, No. 96-Civ-8386, 2002 WL 319887, at *2.

The Zyklon B Case provides a clear example of when liability would attach in the third circumstance, when a defendant provides "the tools, instrumentalities, or services to commit [human

rights] violations with actual ... knowledge that those tools, instrumentalities or services will be (or only could be) used in connection with that purpose." *See* Trial of Bruno Tesch and Two Others (The Zyklon B Case), 1 Law Reports of Trials of War Criminals 93 (1947) (British Military Ct., Hamburg, Mar. 1-8, 1946). In that case, Bruno Tesch was the sole owner of a firm that distributed Zyklon B, a highly dangerous poison gas, to Auschwitz and other concentration camps from 1941 to 1945. Zyklon B previously had been used as a disinfectant in public buildings. The evidence showed that Tesch himself proposed using the gas to exterminate human beings, undertook to train the S.S. in this "new method of killing," and was aware that, by June 1942, the gas was being used for such a purpose. *Id.* at 95. The Prosecutor successfully argued that "knowingly to supply a commodity to a branch of the State which was using that commodity for the mass extermination of Allied civilian nationals was a war crime, and that the people who did it were war criminals for putting the means to commit the crime into the hands of those who actually carried it out." *Id.* at 94.

These examples are illustrative rather than exhaustive, and I offer them in an effort to provide greater substantive content for a doctrinal framework that, like most common law rules, is "vague" and abstract in its articulation of legal obligations and culpable conduct. Opinion of Judge Korman at 133 (criticizing Restatement aiding-and-abetting standard as "vague and inappropriate in the present context"). Standards such as "substantial assistance" and "actual or constructive knowledge" are hardly "newly minted," however, and judicial decisions interpreting the meaning of these standards in the context of individual cases will provide guidance to

courts considering accessorial liability under the ATCA. *See, e.g., Henry v. Lehman Commercial Paper, Inc.*, 471 F.3d 977, 993 (9th Cir. 2006) (applying California law on the "knowledge" requirement of § 876); *Aetna Cas. & Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519, 535–37 (6th Cir. 2000) (applying knowledge and substantial assistance requirements of § 876); *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 113 F.3d 1484, 1496 (8th Cir. 1997) (addressing "substantial assistance" requirement in context of products liability litigation); *Rochez Bros., Inc. v. Rhoades*, 527 F.2d 880, 886 (3d Cir. 1975) ("It has been held that liability for aiding and abetting may be found on less than actual knowledge of the illegal activity. How much or how little knowledge would seem to vary with the facts of each case." (citation omitted)). Common law decisionmaking proceeds through the incremental, analogical application of broadly-stated principles, and it is therefore not amenable to the formulation of finely detailed rules in the manner of a regulatory code. Contrary to the dissent's suggestions, however, the contextual nature and factual sensitivity of common law judicial rulemaking takes account of the "practical problems" that can result from ill-designed legal rules, and the flexibility of the common law process allows those problems to be addressed and avoided as they arise.

In the case at bar, plaintiffs have alleged, albeit in insufficiently specific terms, that the defendant corporations (a) knowingly and substantially assisted a principal tortfeasor to commit acts that violate clearly established international law norms, and (b) facilitated the commission of international law violations by providing the principal tortfeasors with the tools, instrumentalities, or services to commit those

violations with actual or constructive knowledge that those tools, instrumentalities, or services would be (or only could be) used in connection with that purpose. Such allegations, if proven, clearly satisfy the standard for asserting ATCA liability under an aiding and abetting theory.

As to the arguments raised by the Ntsebeza and Digwamaje plaintiffs regarding direct liability claims and the district court's treatment of them, I concur with and join in Part II.E of Judge Katzmann's concurring opinion.

## III

This case has confronted our panel with a number of difficult and unsettled questions in a controversial area of the law. As have other courts, *see, e.g., Tel-Oren*, 726 F.2d at 775, we have struggled with these issues in an effort to find some ground on which a majority of our panel could fully agree. Unfortunately, despite tireless debate, we remain diverse in our perspectives. Though our already lengthy opinions scarcely demand lengthening, I wish to articulate in a bit more detail one objection to the dissent covered in part in footnote 14 of the per curiam opinion.

The dissent contends that the district court lacked subject matter jurisdiction as a result of certain justiciability doctrines, such as case specific deference, the political question doctrine, and international comity. Respectfully, this contention is in error. In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court distinguished between the two. The existence, *vel non*, of subject matter jurisdiction is simply a question (with few exceptions not relevant here) of whether a claim arises under federal law. *Id.* at 198. If subject matter jurisdiction exists, a court

may then—and only then—inquire as to the applicability of any of the various justiciability doctrines:

> The District Court was uncertain whether our cases withholding federal judicial relief rested upon a lack of federal jurisdiction or upon ... "[]justiciability." The distinction between the two grounds is significant. In the instance of nonjusticiabiity, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction the cause either does not "arise under" the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, § 2), or is not a "case or controversy" within the meaning of that section; or the cause is not one described by any jurisdictional statute.

*Id.* (citations omitted). As this quote makes clear, the dissent errs in conflating the anterior question of the existence of subject matter jurisdiction with the posterior question of justiciability. *Cf. Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191 (2007) ("[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit

...."). The dissent's error is not a minor one. By conflating these questions, the dissent provides itself the opportunity to discuss case specific deference, the political question doctrine, and international comity. This discussion, in turn, contains a number of missteps, at least two of which merit our attention in this context. The dissent suggests a district court—or even an appellate court, sitting in review—must dismiss a case when the executive branch, through a State Department Statement of Interest or other document, deems a case to be a political "irritant." This is not so. Mere executive fiat cannot control the disposition of a case before a federal court. Our principle of separation of powers not only counsels the judiciary to conduct an independent inquiry—it requires us to do so. Regardless of what else *Sosa* holds, it did not doubt that ATCA suits are *law suits* constitutionally entrusted to the judiciary. *Cf. Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 69 (2d Cir. 2005) ("[N]ot every case touching foreign relations is nonjusticiable and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights." (quoting *Kadic*, 70 F.3d at 249 (internal quotation marks omitted)). Thus a district court must weigh the Statement of Interest, as well as other relevant facts, in applying the *Baker v. Carr* factors and exercising its own discretion before deciding whether to dismiss a complaint.

## IV

For the foregoing reasons, I join in the per curiam opinion.

Korman, District Judge, concurring in part and dissenting in part:

Today, the majority allows three class actions on behalf of all persons who lived in South Africa between 1948 and the present and who suffered damages as a result of apartheid to go forward in a United States court against American, Canadian, and European corporations that sold goods and materials or made loans to the Union of South Africa during the apartheid era. It does so over the vigorous objections of the United States, its allies, and, most notably, the Republic of South Africa, which is justifiably proud of the ability of its legal system to adjudicate legitimate human rights claims. In doing so, the majority also ignores a direct signal from the Supreme Court of the United States regarding the nonviability of these claims. The majority also declines to dismiss the case, even though the legal foundation of the complaints was expressly rejected by a judgment rendered in Nuremberg that "[l]oans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime." *United States v. von Weizsaecker* ("*The Ministries Case*"), 14 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* 308, 622 (William S. Hein & Co., Inc. 1997) (1949). The defendant in that case was an officer of the Dresdner Bank, which is a named defendant in this case. The theory of liability was that the Dresdner Bank provided loans to businesses knowing that the funds would be used to finance enterprises that employed slave labor. In acquitting the corporate officer of the charges relating to slave labor, the tribunal at Nuremberg observed that:

> The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will us[e] the funds in financing enterprises which are employed in using labor in violation of either national or international law... A bank sells money or credit in the same manner as the merchandiser of any other commodity. It does not become a partner in enterprise and the interest charged is merely the gross profit which the bank realizes from the transaction, out of which it must deduct its business costs, and from which it hopes to realize a net profit. Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime. Our duty is to try and punish those guilty of violating international law, and we are not prepared to state that such loans constitute a violation of that law ...

*Id.* Indeed, the theory of liability rejected by the tribunal is the same as that alleged here against Dresdner Bank. A002 11-12. Specifically, along with other banks, it is accused of providing "[f]oreign capital in the form of trade loans, large international bonds and credits, direct loans...to South African borrowers, and project financing [that] supported the apartheid regime." A00194.

Instead of deferring to the reasoned judgment rendered at Nuremberg, one member of the majority, Judge Hall, eschews any reference to sources of customary international law and applies a principle of aiding-and-abetting in civil cases that the Supreme Court observed "has been at best uncertain in application ... with the common-law precedents 'largely confined to isolated acts of adolescents in rural society.'" *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181 (1994) (quoting *Halberstam v. Welch*, 705 F.2d 472, 489 (D.C. Cir. 1983)). The second member of the majority, Judge Katzmann, concludes that a defendant's liability for aiding-and-abetting a crime against humanity must be determined by reference to customary international law, and he then goes on to articulate the standard for determining such liability. While the standard he enunciates is consistent with the holding in the *Ministries Case*, and also reflects an emerging consensus on the appropriate standard for holding a private party liable for aiding-and-abetting, he joins Judge Hall in voting to vacate the judgment dismissing the case without deciding whether the allegations in the complaints are sufficient to satisfy that standard, and without addressing the objections of the United States and the Republic of South Africa to the exercise of jurisdiction over the complaints.

## Background

Because the allegations in the complaint go unmentioned in the *per curiam* and concurring opinions, it is necessary to provide an overview of the case beyond describing the procedure by which the case made its way here. Judge Sprizzo's opinion in the district court contains a detailed and accurate description of the hundreds of pages of allegations contained in the three voluminous complaints. *See In*

*re South African Apartheid Litig.*, 346 F. Supp. 2d 538, 543-46 (S.D.N.Y. 2004). This enables me to provide the following brief background.

In 1948, the National Party came to power in South Africa. From then until the early 1990s, that ruling party imposed and enforced a set of laws under which the non-white population was the subject of disenfranchisement, state-sponsored discrimination, and repression. These laws, establishing what became known as apartheid, included severe curtailments on the liberty of nonwhites with respect to residency, travel, assembly, education, employment, and marriage. Apartheid's restrictions were enforced by members of South Africa's military and police, and the history of apartheid includes many instances of arbitrary detention, torture, and killings by those state actors. The complaints recount many of those instances of wrongful conduct by apartheid government officials, including the Sharpeville Massacre of 1960, the Soweto Massacre of 1976, and the killing of the Craddock Four in 1985.

The allegations are very different with respect to the defendants. The portions of the complaints relating to defendants' alleged conduct focus principally on their trade with South Africa. Thus, car companies are accused of selling cars, computer companies are accused of selling computers, banks are accused of lending money, oil companies are accused of selling oil, and pharmaceutical companies are accused of selling drugs. The theory of the complaints is that in this way defendants facilitated or "aided-and-abetted" apartheid and its associated human rights violations. To support that theory, the complaints allege generally that defendants knew of the racist policies of apartheid; that they nevertheless so en-

gaged in the transactions in and with the Union of South Africa; and that, had they not done so, the apartheid regime would have collapsed, apartheid would have ended sooner, and plaintiffs would not have suffered some or all of their injuries. The causal theory advanced by the Khulumani plaintiffs is even weaker: "Apartheid would not have occurred *in the same way* without the participation of defendants." A00166 (emphasis added). Typical of the allegations are:

- "Apartheid needed the cooperation, financing and supplies from the defendant financial institutions and companies and/or their predecessors or successors to ensure that they had the technology, equipment, systems, infrastructures and weaponry to insure that their system could function." A00304.
- "Without oil, the police and military could not have functioned and the economy of South Africa would have come to a standstill." A00171.
- "More than any other single technological advancement, the computer fostered the concentration of administrative power in the hands of Africa's white elite." A00427.
- "Many computer uses were crucial for the apartheid regimes' [*sic*] keeping track of political activists who were later targeted for assassinations." A00430.
- "[A]ny transfer of capital to South Africa had military implications: loans to the railways and harbors systems assisted in the mobilization of the armed forces; trade financing provided the computers and telecommunications equipment necessary to the efficient function-

ing of a modern army; financing for housing project perpetuated the segregated housing of apartheid." A00201.

- "The money from defendant German banks directly benefitted and supported the apartheid reign of terror in South Africa." A00440.
- "Limitations on the employment of non-whites in salaried, administrative jobs puts a premium on automating such tasks. In this sense, U.S. computer firms helped to solve the skilled white labor problem." A00428; *see also* A00306-07.
- "Defendant vehicle manufacturers knowingly supplied vehicles, parts, and other equipment to the South African Police (SAP), South African Defense Force (SADF) and South African Army. ...These vehicles were used to patrol African townships, homelands, and other areas and were used to suppress dissent." A00216; *see also* A00312.

The complaints themselves seek relief on behalf of all persons who lived in South Africa between 1948 and the present who suffered damages as a result of apartheid. Moreover, they seek to hold responsible each of the defendants, whom they characterize as aiders-and-abetters, liable for "all acts comprising the entire system of apartheid – a criminal enterprise." A00255. Nevertheless, they fail to link the conduct of a specific defendant to an injury suffered by a particular plaintiff. On the contrary, the gravamen of the complaints is not that individuals should recover from particular defendants in tort, but that millions of people who "lived under the apartheid system", A00095, should recover from all

the defendants for having been "subject to ... the overwhelming injustices that characterized apartheid." *Id.* In sum, these are reparations cases, seeking at least $400 billion in reparations, rather than torts cases for damages. They fail to allege a cognizable cause of action.

Moreover, the plaintiffs conceded at oral argument that they are not anxious to amend their complaints to link a particular plaintiff to injuries caused by a particular defendant. Tr. at 64. Indeed, the attorney for the Khulumani plaintiffs acknowledged that he would not necessarily be satisfied with such an amendment, but that he would "accept it because it would be a beginning." Tr. at 80. Nevertheless, he confessed that "[w]hat's at stake here is almost by definition of the crime an inability to make that exact trace or that degree of particularity." Tr. 80-81. This concession alone establishes that the allegations in any amended complaints would be insufficient "to raise a reasonable expectation that discovery will reveal evidence" to support them. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). Instead, these complaints would simply provide a vehicle to coerce a settlement. Nevertheless, the *per curiam* opinion reverses the order dismissing the complaints and orders Judge Sprizzo to rule again on plaintiffs' motions for leave to replead, because plaintiffs have indicated "that, if given the opportunity, they would narrow the claims and clarify the allegations against the various defendants." *Per Curiam* Op. *ante* at 13-14.

I dissent from the holding keeping these claims alive for the reasons alluded to earlier and because (1) the Supreme Court, in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), has instructed us that this is

the very sort of case in which jurisdiction should not be exercised; (2) the State Department has filed a persuasive Statement of Interest in this matter urging dismissal because of the adverse effect the continued prosecution of these cases would have on the interests of the United States and our relations with other countries; and (3) the Republic of South Africa, a democratically elected government representative of all South Africans, including the victims of apartheid, has asserted the right to define and finalize issues related to reparations for apartheid-era offenses within its own legal framework – thus making this lawsuit an insult to the post-apartheid, black-majority government of a free people. These grounds, among others, reinforce the compelling policy argument that a decision to hear these cases would "reflect[] the worst sort of 'judicial imperialism'...[and] send the message that the United States does not respect the ability of South African society to administer justice by implying that U.S. courts are better placed to judge the pace and degree of South Africa's national reconciliation." Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 Colum. J. Transnat'l L. 153, 166 (2003).

**Discussion**

**1. Deference to the United States and the Republic of South Africa**

This appeal is unique. Departing from its usual practice, the Supreme Court, in the context of deciding a different case, has already given us guidance as to how this appeal should be decided. In *Sosa*, it held that, in determining whether the Alien Tort Claims Act (the "ATCA") provides a basis for the exercise of jurisdiction over an alleged tort in violation of the law of nations, courts must apply "principle[s] limit-

ing the availability of relief" beyond the requirement that the international law norm whose violation is alleged be sufficiently defined. 542 U.S. at 733 n.21. Specifically, because the decision to permit a case to proceed involves "an element of judgment about the practical consequences of making that cause available to litigants," *id.* at 732-33, the Supreme Court suggested that "case-specific deference to the political branches," *id.* at 733 n.21, provided one limitation on the exercise of jurisdiction under the ATCA in certain instances.

Among the reasons for such deference is that the recognition of private rights of action for violations of international law may give rise to "collateral consequences." *Id.* at 727. Specifically, the Court cautioned that "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* The Court continued: "Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution." *Id.* at 727-28. Then, focusing on the case before us on this appeal, the Supreme Court continued:

> For example, there are now pending in Federal District Court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa. *See In re South African Apartheid Litigation*, 238 F.

Supp. 2d 1379 (JPML 2002) (granting a motion to transfer the cases to the Southern District of New York). The Government of South Africa has said that these cases interfere with the policy embodied by its Truth and Reconciliation Commission, which "deliberately avoided a 'victors' justice' approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill." Declaration of Penuell Mpapa Maduna, Minister of Justice and Constitutional Development, Republic of South Africa, reprinted in App. to Brief for Government of Commonwealth of Australia et al. as *Amici Curiae* 7a, ¶ 3.2.1 (emphasis deleted). The United States has agreed. *See* Letter of William H. Taft IV, Legal Adviser, Dept. of State, to Shannen W. Coffin, Deputy Asst. Atty. Gen., Oct. 27, 2003, reprinted in *id.*, at 2a. In such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy. *Cf. Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004) (discussing the State Department's use of statements of interest in cases involving the Foreign Sovereign Immuni-

> ties Act of 1976, 28 U.S.C. § 1602 *et seq.*).

*Id.* at 733 n.21.

The Executive Branch's view of the impact of these cases on foreign policy is set forth at some length in a letter to the district court, dated October 27, 2003, from the Legal Advisor of the Department of State. The letter advises "that continued adjudication of the above-referenced matters risks potentially serious adverse consequences for significant interests of the United States." A01090. After outlining the objections of the Republic of South Africa to the continued prosecution of these cases in the United States and noting the "extensive steps" it has taken "to promote reconciliation and redress for apartheid-era injustices," the Legal Advisor observed that the Republic of South Africa "is broadly representative of the victims of the apartheid regime" and "is uniquely charged with a popular mandate to deal with the legacy of apartheid." *Id.* He then concluded his discussion of this aspect of the Executive Branch's concern as follows:

> Support for the South African government's efforts in this area is a cornerstone of U.S. policy towards that country. For that reason, we are sensitive to the view of the South African government that adjudication of the cases will interfere with its policy goals, especially in the areas of reparations and foreign investment, and we can reasonably anticipate that adjudication of these cases will be an irritant in U.S.-South African relations. To the extent that adjudi-

> cation impedes South Africa's ongoing efforts at reconciliation and equitable economic growth, this litigation will also be detrimental to U.S. foreign policy interests in promoting sustained economic growth in South Africa.

*Id.*

The State Department also voiced other concerns. For one thing, the Legal Advisor wrote, "[v]arious other foreign governments, including those of the United Kingdom and Canada, have also approached us via diplomatic channels to express their profound concern that their banks, corporations and other entities have been named as defendants." A01090-91. Because of those governments' "strong belief that the issues raised in the litigation are most appropriately handled through South Africa's domestic processes," the State Department "anticipat[ed] possible, continuing tensions in our relations with these countries over the litigation." A01091.

Moreover, the Legal Advisor expressed concern over the chilling effect that actions of this kind may have on future foreign investment in developing countries:

> The United States relies, in significant part, on economic ties and investment to encourage and promote positive change in the domestic policies of developing countries on issues relevant to U.S. interests, such as respect for human rights and reduction of poverty. However, the prospect of costly litigation and potential liability

> in U.S. courts for operating in a country whose government implements oppressive policies will discourage the U.S. (and other foreign) corporations from investing in many areas of the developing world, where investment is most needed and can have the most forceful and positive impact on both economic and political conditions. To the extent that the apartheid litigation in U.S. courts deters such investment, it will compromise a valuable foreign policy tool and adversely affect U.S. economic interests as well as economic development in poor countries.

*Id.*

In *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57 (2d Cir. 2005) (Cabranes, *J.*), we recognized that "[j]udicial deference to the Executive Branch on questions of foreign policy has long been established under the prudential justiciability doctrine known as the 'political question' doctrine. ..." *Id.* at 69. In deciding what deference to accord the position of the Executive Branch, we referenced the foundational case of *Baker v. Carr*, which identified six independent tests for recognition of a political question. 369 U.S. 186, 217 (1962). In *Whiteman*, we directed the dismissal of the complaint without examining each of the *Baker* tests because it was clear that the case met the fourth test, namely that "'a court's undertaking independent resolution' of this claim is impossible 'without expressing lack of the respect due' the Executive Branch." 431 F.3d at 72 (emphasis deleted) (citations omitted).

We need not examine any of the six independent tests identified in *Baker* because *Sosa* plainly held that the determination of whether to exercise jurisdiction over a cause of action for a violation of the law of nations is subject to "case-specific deference to the political branches." 542 U.S. at 733 n.21. More than that, the Supreme Court advised us that in the *instant* cases "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Id.* Indeed, one commentator, who has emphasized the need for a "searching review" of the Bush administration's positions in human rights cases, has acknowledged that the present cases are different:

> [These] cases reflect the unique history of South Africa and its transition from apartheid to democracy. The government that replaced the apartheid regime was recognized internationally as representative both of the majority of the nation and, in particular, of the victims of past human rights abuses. The transition included a negotiated process by which abuses would be investigated and perpetrators given the opportunity to testify about their actions in return for amnesty. When the democratically elected, representative government of South Africa objected to the impact of the U.S. litigation on the negotiated transition process, the executive branch asked the courts to defer to this judgment. All of these factors provide support for the Court's suggestion that there is a

> "strong argument" that executive branch views "in such cases" are entitled to "serious weight."

Beth Stephens, *Sosa v. Alvarez-Machain, "The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 Brook. L. Rev. 533, 562 (2005). (Professor Stephens and a fellow academic coauthored an *amicus curiae* brief on behalf of international human rights organizations and bar associations in support of the plaintiffs-appellants. While it urges reversal of the judgment of the district court, her *amicus* brief does not address the effect of footnote 21 in *Sosa*.)

In any event, the force of the advice of the State Department is enhanced by the fact that, under the doctrine of international comity, dismissal would be justified solely out of deference to the Republic of South Africa. Comity, a doctrine more easily invoked than defined, may be viewed as either "the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum," *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984), or as "a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state, the so-called comity among courts." *In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996). A court's exercise of discretion to dismiss a suit on comity grounds is independent of its treatment of the views of the Executive Branch. *See Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004) (dismissing a claim on the grounds of international comity after declining to defer to the Executive Branch).

The decision whether to dismiss on this basis depends on the degree to which the interests of a for-

eign sovereign are "legitimately affronted by the conduct of litigation in a United States forum," *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998), steps the foreign sovereign may have taken to address the issues in the litigation, and the extent of our own interest in the underlying issues. *See generally Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582 (2d Cir. 1993) (Newman, J.). Perhaps the most significant factor is whether the foreign sovereign to which we defer is a democratically elected government with an independent judiciary. *Id.* at 585-86.

In the present cases, the extent of the affront to the legitimate interests of the Republic of South Africa, the steps it has taken to address the issue of reparations, and the depth of feeling underlying its concern are amply reflected in the record. On April 15, 2003, in response to the Report of the Truth and Reconciliation Commission ("TRC"), the President of the Republic, Thabo Mbeki, announced the programs that would be implemented to assist the victims of apartheid:

> [W]ith regard to specific cases of individual victims identified by [the] TRC Act, the government has put in place and will intensify programmes pertaining to medical benefits, educational assistance and provision of housing and so on. From time to time, Ministers have elaborated and will continue to expatiate on the implementation of these and other related programmes.
>
> The TRC has reported that about 22,000 individuals or surviving families appeared before the Commission.

> Of these, about 19,000 required urgent reparations, and virtually all of them, where the necessary information was available, were attended to as proposed by the TRC with regard to interim reparations.
>
> With regard to final reparations, government will provide a once-off grant of R30,000 to those individuals or survivors designated by the TRC. This is over and above other material commitments that we have already mentioned.
>
> We intend to process these payments as a matter of urgency, during the current financial year. Combined with community reparations, and assistance through opportunities and services we have referred to earlier, we hope that these disbursements will help acknowledge the suffering that these individuals experienced, and offer some relief.

A00745. President Mbeki then addressed the issue of "civil suits against corporations that benefitted from the apartheid system," specifically this litigation. A00747. After reiterating "that the South African Government is not and will not be a party to such litigation," he continued: "[W]e consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our Constitution of the promotion of national reconciliation." *Id.* While recognizing "the

right of citizens to institute legal action," President Mbeki also emphasized that the government's approach is informed by "the desire to involve all South Africans, including corporate citizens, in a co-operative and voluntary partnership to reconstruct and develop South African society." *Id.* Accordingly, he also rejected the once-off wealth tax on corporations suggested by the TRC. *Id.*

Likewise, in an address to Parliament on the same day, Alec Erwin, the Minister of Trade and Industry, emphasized that the government's rationale for its rejection of the once-off wealth tax applied equally to its opposition to the cases at issue:

> It is for all the above reasons that we are opposed to and indeed contemptuous of attempts to use unsound extra-territorial legal precepts in the [United States of America] to seek personal financial gain in South Africa. Whilst individuals have an inviolate right to recourse in law and this is firmly entrenched in South Africa it is an abuse to use the law, unsound law at that, of another land to undermine our sovereign right to settle our past and build our future as we see fit. South Africans involved in this break that indefinable collectivist identity that was the origin of our strength. The government rejects the actions of legal practitioners in the USA to exploit our history and will not allow any judgment made in the USA or elsewhere to be carried out in South Africa.

A00754-55.

Professor Kader Asmal, the Minister of Education, also assailed the prosecution of these cases. He told the Parliament:

> South Africa must settle this issue for themselves and does not need the help of ambulance chasers and contingency fee operators, whether in Switzerland, the Netherlands, or the United States of America. As South Africans, we have effectively dealt with our own historical challenges and we will continue to do so. It is part of our sovereign right.

A00758.

On April 16, 2003, the day after the addresses quoted above, the Cabinet of the Republic of South Africa resolved that "[i]t remains the right of the [G]overnment [of South Africa] to define and finalise issues of reparations, both nationally and internationally." A00803. Against this backdrop, the then-Minister of Justice, Penuell Mpapa Maduna, filed a declaration in the district court which set forth the Republic of South Africa's view of various cases pending in the United States against corporations that did business with and in South Africa during the apartheid period, including the cases at issue here. The statement summarizes the actions undertaken by the Republic of South Africa "to repair the damage caused by the apartheid system through a broad programme of socioeconomic reparations which has at its heart, the betterment of the lives of the previously disadvantaged." A00801. Then, addressing the prosecution of these cases, he argued

that the remedies sought – including "the demand for billions of dollars in damages to be distributed by the US courts" – are "inconsistent with South Africa's approach to achieving its long term goals." A00805. Specifically, he continued:

> Permitting this litigation to go forward will, in the government's view, discourage much-needed direct foreign investment in South Africa and thus delay the achievement of our central goals. Indeed, the litigation could have a destabilising effect on the South African economy as investment is not only a driver of growth, but also of employment. One of the structural features of the South African economy, and one of the terrible legacies of apartheid, is its high level of unemployment and its by-product, crime. Foreign direct investment is essential to address both these issues. If this litigation proceeds, far from promoting economic growth and employment and thus advantaging the previously disadvantaged, the litigation, by deterring foreign direct investment and undermining economic stability will do exactly the opposite of what it ostensibly sets out to do.

A00805-06. The last paragraph of Minister Maduna's declaration invoked the doctrine of international comity. He observed

> that under United States law, courts may abstain from adjudicating cases

> in deference to the sovereign rights of foreign countries to legislate, adjudicate and otherwise resolve domestic issues without outside interference, particularly where the relevant government has expressed opposition to the actions proceeding in the United States, and where adjudication in the United States would interfere with the foreign sovereign's efforts to address matters in which it has the predominant interest. The government submits that its interest in addressing its apartheid past presents just such a situation.

A00806.

Most recently, on this appeal, the Republic of South Africa filed an *amicus curiae* brief, which is not addressed in the *per curiam* and concurring opinions and is not specifically listed among the parties filing briefs on this appeal, arguing that these actions "fundamentally interfere with South Africa's independence and sovereignty and intervene in its internal affairs, including its right under international law to address its apartheid past and to develop policies for its future in the manner it deems most appropriate, subject to the support and approval of the democratic electorate." Br. for S. Afr. as *Amicus Curiae* at 1-2. Specifically, it emphasized that the continuation of this litigation would discourage business investment and, thereby, disrupt the growth of the South African economy. *Id.* at 3-4. In a statement appended to the brief, the current South African Minister of Justice, Brigitte Sylvia Mabandla, repeated verbatim the earlier statement

of former Minister Maduna, adding that "another country's courts should not determine how ongoing political processes in South Africa should be resolved." *Id.* annex at 1.

In light of the consistent and considered policy of the Republic of South Africa and the programs it has put in place to provide reparations and assistance to the identifiable victims of apartheid, it is difficult to conceive of any policy reason for exercising jurisdiction over these cases. On the contrary, "[m]ost judges would not want, by asserting their own jurisdiction in a doubtful case, to undermine efforts to rebuild national sovereignty, democratic institutions, and self-respecting courts, in countries that have lately suffered from catastrophic events that include international crimes." Michael Kirby, *Universal Jurisdiction and Judicial Reluctance: A New "Fourteen Points", in Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* 240, 255 (Stephen Macedo, ed. 2004). Indeed, Professor William R. Casto, whose scholarship was cited repeatedly by the Supreme Court in *Sosa*, has written that the apartheid regime in South Africa may be an example of a situation "in which a nation's prior government has engaged in the most despicable misconduct, but the current government is making an honest, perhaps faltering, but nevertheless real effort to rectify the past misdeeds . . . . If apartheid were determined to be a violation of clearly established international law, a tort remedy for the victims of that evil system might nevertheless be inappropriate." William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 Rutgers L.J. 635, 656 (2006).

Particularly apposite here is the characteristically thoughtful opinion of Judge Newman in *Bi v. Union Carbide Chemicals & Plastics Co*, 984 F.2d 582. The case arose out of the devastating Bhopal industrial accident, in which deadly gas from a plant operated by Union Carbide India Ltd. ("UCIL") blew into a densely populated part of India. Some 145 class actions were filed in federal district courts across the United States and consolidated in the Southern District of New York. After the case was dismissed on the grounds of *forum non conveniens*, the Indian government, to which its parliament granted the exclusive authority to represent the victims of the disaster in India and elsewhere, filed suit in India on behalf of all claimants. India and Union Carbide ultimately agreed to a court-approved settlement, by which the latter agreed to pay $470 million to the Indian government for the benefit of all victims of the disaster.

After the settlement of the class actions in India, two cases were filed in Texas state courts on behalf of other victims of the Bhopal disaster. The cases were transferred to the Southern District of New York, where Judge Keenan dismissed both actions on the ground of *forum non conveniens*. We affirmed the dismissal, although on different grounds. Judge Newman described the appeal as presenting "an interesting issue of comity among nations in the resolution of claims arising from torts occurring within a foreign country." *Bi*, 984 F.2d at 583. The precise issue he identified

> is whether the federal and state courts of this country should defer to the judgment of a democratic foreign government that disputes arising

> from a mass tort occurring within its borders can be best resolved by according the foreign government exclusive standing to represent the victims of the disaster in the courts of the world.

*Id.* We declined to permit the plaintiffs to prosecute the class actions in federal or state court, notwithstanding their arguments that settlement of their claims by the Indian government was unfair and improper because, among other things,

> the Indian Government had an unacceptable conflict of interest as part owner of UCIL, most of the victims oppose the settlement as grossly inadequate, and their due process rights were violated because they received inadequate notice and inadequate representation in the proceedings and because they could not opt out of the settlement.

*Id.* at 584.

After describing in detail the structure of the Indian government, pursuant to a Constitution that "provides for a republican form of parliamentary government and guarantees the fundamental rights of the people, including equal protection and procedural due process," *id.* at 585, Judge Newman observed that India had chosen "to represent exclusively all the victims in a suit against Union Carbide and to use the money it received in settlement of that suit to fund a plan framed ... to process the claims of all the victims." *Id.* at 586. Under these circumstances, he wrote, "[t]o grant the victims of the Bho-

pal disaster, most of whom are citizens of India, access to our courts where India has set up what it believes to be the most effective method of dealing with a difficult problem would frustrate India's efforts." *Id.* "[W]ere we to pass judgment on the validity of India's response to a disaster that occurred within its borders," Judge Newman continued, "it would disrupt our relations with that country and frustrate the efforts of the international community to develop methods to deal with problems of this magnitude in the future." *Id.*

Moreover, it was not relevant whether "under our constitutional standards, our Government could pass an act similar to the Bhopal Act" pursuant to which the Indian government settled the claims that the plaintiffs sought to prosecute. *Id.* Instead, he wrote that:

> when a recognized democracy determines that the interests of the victims of a mass tort that occurred within its borders will be best served if the foreign government exclusively represents the victims in courts around the world, we will not pass judgment on that determination, and we will permit only the foreign government access to our courts to litigate those claims, subject of course to our own requirements for standing. This conclusion is especially compelling in a case such as this where almost all of the victims are Indian citizens.

*Id.*

The present cases involve a stronger basis for dismissal under the doctrine of international comity. Like India, the Republic of South Africa is a sovereign democratic state whose policies broadly reflect the interests of its people. Moreover, it has adopted policies and programs designed to address the effects of apartheid and compensate its victims. However, unlike the plaintiffs in Bi, whose claims were wiped out under Indian law and who had no alternative forum, the plaintiffs here may have a competent alternative forum in their home country that, by all accounts, is prepared to hear their grievances. Indeed, the plaintiffs have themselves acknowledged that relief would be available in the courts of the Republic of South Africa. *See* Khulumani Reply Br. at 27 ("No relief from civil or criminal liability was enacted for those who did not apply for and obtain amnesty from the TRC, ... South Africa's approach leaves open the possibility for individual citizens to take up any grievance related to human rights violations with the courts ...") (internal quotation marks omitted); Ntsebesa Reply Br. at 28 ("The acts alleged in plaintiffs' complaints are illegal and would subject the defendants to suit in both the United States and South Africa ...").

Significantly, President Mbeki has stated, "[the] Government recognizes the right of citizens to institute legal action." A00747. Likewise, in criticizing the prosecution of these cases in the United States, Minister Erwin noted that the plaintiffs "have an inviolate right to recourse in law" – just not in the United States. A00754. Thus, unlike the victims of the Bhopal disaster, there is every indication they may have their day in court, in their home country, before an independent judiciary, in a manner consistent with traditional notions of due process. As Min-

ister Maduna stated in his declaration to the district court:

> Under the Constitution, the judicial authority of the Republic is vested in the courts, which are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. No person or organ of state may interfere with the functioning of the courts, while all other organs of the state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. An order or decision of a court binds all persons to whom and organs of state to which it applies. South Africa has a well developed judicial system, with the Constitutional Court at its apex and the Supreme Court of Appeal as the final court of appeal in non-constitutional matters. Judgments of the Constitutional Court and, indeed, the Supreme Court of Appeal, are widely admired for their independence and incisiveness and are frequently referred to in judgments of other final courts of appeal internationally.

A00798-A00799. Similarly, as one scholar of South African law has observed,

> [t]he new constitutional law not only introduced the ethos of a democratic

> *Rechtsstaat*, but also enacted an extensive array of socioeconomic rights that are designed to change South African society fundamentally. These can be and indeed already have been used to secure, through litigation, the interests of the traditionally marginalised groups and to ensure their place on the political agenda.

François du Bois, *Introduction: History, System and Sources, in Introduction to the Law of South Africa* 1, 3-4 (C.G. van der Merwe & Jacques E. du Plessis eds., 2004).

While I have assumed the availability of a forum in the Republic of South Africa, *Bi* makes clear that such an alternative forum is not always required before the doctrine of comity may be invoked. *See also Jota*, 157 F.3d at 160 ("[C]ases might be imagined where a foreign sovereign's interests were so legitimately affronted by the conduct of litigation in a United States forum that dismissal is warranted without regard to the defendant's amenability to suit in an adequate foreign forum. ..."). Nevertheless, even if the availability of an alternative forum were an absolute prerequisite to dismissal on the ground of international comity, and one were not available in these cases, deference to South African law would be justified under a traditional choice-of-law analysis. Indeed, although he did not *in haec verba* invoke such analysis, Judge Newman's opinion in *Bi* is entirely consistent with it.

We have previously held that the assumption of subject matter jurisdiction over a cause of action under the ATCA does not preclude a choice-of-law analysis resulting in dismissal of the case. *Filartiga*

*v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980). This inquiry is separate from the jurisdictional analysis. Indeed, we have read *Filartiga* as "requiring the district court to perform a traditional choice-of-law analysis to determine whether international law, [the] law of forum state, or [the] law of state where events occurred should provide substantive law in such an action." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 n.12 (2d Cir. 2000).

I engage in a hypothetical choice-of-law analysis here, because it focuses on the governmental interests of South Africa and the United States and serves to reinforce the argument against exercising jurisdiction over these cases. As we have observed,

> [t]he federal common law choice-of-law rule is to apply the law of the jurisdiction having the greatest interest in the litigation. ... The goal of this analysis is to evaluate the various contacts each jurisdiction has with the controversy, and determine which jurisdiction's laws and policies are implicated to the greatest extent.

*In re Koreag, Controle et Revision S.A.*, 961 F.2d 341, 350 (2d Cir. 1992). In this case, the Republic of South Africa has the greatest interest, if not the only interest, in the application of its laws. The conduct alleged took place in South Africa and the victims were its own citizens. The remedies that its citizens should have as a result of the injuries they suffered at the hands of the apartheid regime are matters exclusively for its democratically elected post-apartheid government.

Moreover, the tenuous interest of the United States in the issues raised by these cases is also reflected in the fact that, under customary international law, we could not exercise subject matter jurisdiction over a cause of action against the primary tortfeasor – the officials of the Union of South Africa – or the foreign corporate defendants. This is so, because apartheid, however abhorrent it may have been, has not been regarded as an offense subject to the exercise of universal jurisdiction. This concept, as its name implies, "recognize[s] that international law permits any state to apply its laws to punish certain offenses although the state has no links of territory with the offense, or of nationality with the offender (or even the victim)." *Restatement (Third) of Foreign Relations Law* § 404 cmt. a (1987); *see also Matter of Extradition of Demjanjuk*, 612 F. Supp. 544, 555-58 (N.D. Ohio 1985). Universal jurisdiction is dependent not only on "substantive agreement as to certain universally condemned behavior," which transforms the behavior into a violation of customary international law, but also "procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior." *Sosa*, 542 U.S. at 762 (Breyer, *J.*, concurring in part and concurring in the judgment).

There is no agreement with respect to the latter issue. Although the *Restatement (Third) of Foreign Relations Law* cites racial discrimination, "when [ ] practiced systematically as a matter of state policy, e.g., apartheid," as a violation of customary international law, *id.* § 702 cmt. i(emphasis deleted), it omits apartheid from the list of offenses subject to universal jurisdiction. Instead, the Restatement states that universal jurisdiction exists only for "certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade,

attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism." *Id.* § 404. Indeed, while the Reporters of the Restatement observed that the International Convention on the Suppression and Punishment of the Crime of Apartheid, *adopted* Nov. 30, 1973, 1015 U.N.T.S. 243 (the "Apartheid Convention"), provided for universal jurisdiction, they stated that it did so only "[a]mong [the] parties to the Convention." *Restatement (Third) of Foreign Relations Law* § 702 reporters' note 7. *See* also Antonio Cassese, *Crimes Against Humanity, in* 1 *The Rome Statute of the International Criminal Court: A Commentary* 353, 376 (Antonio Cassese et al., eds., 2002) (observing that the Rome Statute, enacted in 1998, is broader than customary international law and "expands general international law" insofar as it, *inter alia*, "broadens the classes of conduct amounting to crimes against humanity" to include "the crime of apartheid").[1] Likewise, the European Commission, the executive body of the European Union, has stated explicitly that, while "apartheid[] is widely condemned by states ...at least at

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[1] The Rome Statute does not apply to "conduct prior to the entry into force of the Statute." Rome Statute of the International Criminal Court art. 24(1), *open for signature* July 17, 1998, 37 I.L.M. 999, 1016 (entered into force July 1, 2002). As one commentator explained, "[t]o be acceptable to the broadest possible majority of countries, many of which had dark experiences in the past and had to resort to amnesties or similar solutions to achieve national reconciliation, criminal responsibility under the Rome Statute could not be made retroactive ...." Per Saland, *International Criminal Law Principles, in The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* 189, 196 (Roy S. Lee ed., 1999). This may explain why the Republic of South Africa, which never ratified the Apartheid Convention, ratified the Rome Statute.

present, it does not give rise to universal jurisdiction because, among other reasons, the [Apartheid Convention] ... has not been widely ratified." Br. for the European Commission as *Amicus Curiae* Supporting Neither Party, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (No. 03-339), 2004 WL 177036, at *16 n.35. Another reason is that jurisdiction is limited to certain universally condemned crimes which "by their nature occur either outside of a State or where there is no State capable of punishing, or competent to punish, the crime (as in a time of war)." *United States v. Yousef*, 327 F.3d 56, 105 (2d Cir. 2003). Of course, with respect to the conduct alleged here, there is now a State capable of providing redress in a competent manner.

Under these circumstances, particularly the failure of the United States to sign or ratify the Apartheid Convention, denying a forum for these cases at this point cannot be said to undermine any interest of the United States. To the contrary, as the United States argues in its *amicus* brief, the prosecution of these cases harms significant interests of the United States. Obviously, the congressional interest in making available a forum under the ATCA would be undermined if we denied a forum where the regime, which violated the norm, was the same one that decided that such a cause of action should not be pursued. *See Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 415 (S.D.N.Y. 2002) (declining deference to law of the foreign state in action alleging actionable conduct by a sitting government). But that is not the case here, for as the State Department has observed, the laws of the Republic of South Africa reflect policy judgments made by a government that "is broadly representative of the victims of the apartheid regime" and "uniquely charged with a popular mandate to deal

with the legacy of apartheid." A01090. We have no interest in undermining its law or policy.

In sum, to quote again from one learned commentary:

> A court decision to hear an Alien Tort Statute claim over action in South Africa reflects the worst sort of "judicial imperialism." It would send the message that the United States does not respect the ability of South African society to administer justice by implying that U.S. courts are better placed to judge the pace and degree of South Africa's national reconciliation. In contrast, U.S. intervention to block such a suit sends a different signal to South Africa and other countries struggling through difficult political transitions. It would communicate our recognition of the respected position that the justice system holds in South Africa and reinforce the importance of having those claims judged in that country.

Schrage, *supra*, at 166.[2]

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[2] The Khulumani plaintiffs also argue that, "[t]he ATS aside, there are independent grounds for jurisdiction in federal court", namely, diversity of citizenship pursuant to 28 U.S.C. § 1332. Br. for App. at 56. These causes of action, however, are also subject to dismissal based on deference to the Executive Branch's view of the foreign policy impact of allowing them to proceed, and on the doctrine of international comity. *See Bi.*, 984 F.2d at 586-87; *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 357 (D.C. Cir. 2007) (Kavanaugh *J.*, dissenting from denial of writ

The majority declines to address the aspect of *Sosa* directing courts to determine the deference owed to the Executive Branch's view of the case, notwithstanding the facts that both parties and *amici* devote many pages of argument to this issue and that the issue goes directly to whether subject matter jurisdiction should be exercised over the cause of action alleged by the plaintiffs. The principal reason given for this silence is that "the district court explicitly refrained from addressing the defendants' arguments that the ATCA claim presented a non-justiciable political question." *Per Curiam* Op. *ante* at 12 (citing *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 543 n.4) (parenthetical omitted). The footnote in Judge Sprizzo's opinion, from which the *per curiam* opinion quotes an incomplete excerpt, reads as follows:

> Defendants also argue that there is no case or controversy for this Court to hear under Article III of the Constitution because plaintiffs cannot establish that they have standing to bring this action and because the matter is a non-justiciable political question. See Memorandum of Law in Support of Defendants' Joint Motion to Dismiss at 3-4. Given the Court's finding that defendants are entitled to relief on other grounds,

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of mandamus.) The point of disagreement in Exxon , as the majority acknowledged, *id.*, turned on the availability of a writ of mandamus to review the denial of the defendant's motion to dismiss where the Executive Branch did not unequivocally seek such relief. *See also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-14 (2003); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964).

> the Court need not address these remaining grounds for defendants' motion.

*In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 543 n.4.

Contrary to the *per curiam* opinion, a careful reading of the record shows that Judge Sprizzo did not explicitly refrain from addressing the issue of the deference to be accorded to the position of the State Department under *Sosa*. Indeed, the Memorandum of Law in Support of the Defendants' Joint Motion to Dismiss ("Joint Motion"), which Judge Sprizzo expressly referenced in the part of his opinion declining to address the argument that the ACTA claim presented a non-justiciable political question, argued (in relevant part) that the "adjudication of plaintiffs' claim would require a court to pass on the merits of political questions that were resolved by the executive and legislative branches of the United States government in favor of commerce with South Africa." *Id.* at 3. The defendants did *not* argue that the case should be dismissed in deference to the Statement of Interest filed by the United States, nor did they rely on the advice of the Supreme Court in *Sosa* that the views of the United States *in this case* "certainly deserve[d] great weight." *Sosa*, 542 U.S. at 733 n.2 1. Indeed, the defendants' motion was filed before the Statement of Interest and a year before the Supreme Court suggested that it be afforded deference.

More significantly, a cursory reading of Judge Sprizzo's opinion demonstrates that he did rely on the Supreme Court's advice in *Sosa*. *See In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 547, 551, 553-54. Nevertheless, I am unwilling to burden this opinion any further on this score because, even if

Judge Sprizzo did not rely expressly on the Supreme Court's guidance in *Sosa* as a basis for his holding, this would not be an excuse for avoiding the issue. While cases may be found where we declined to reach an issue not addressed by the district court, *see, e.g., Bigio v. Coca-Cola Co.*, 239 F. 3d 440 (2d Cir. 2000), we have held expressly that we are "free to affirm a district court decision ... even [on] grounds not relied upon by the district court." *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 488 F.3d 112, 134 (2d Cir. 2007) (quoting *Gmurzynska v. Hutton*, 355 F. 3d 206, 210 (2d Cir. 2004)). Thus, in *Bi*, 984 F.2d 582, a mirror image of *Bigio*, the district court had dismissed a complaint on the grounds of *forum non conveniens* – a ground on which the defendant had not moved to dismiss, presumably because of the unavailability of another forum. *See In re Union Carbide Corp. Gas Plant Disaster*, MDL No. 626, 1992 WL 36135 (S.D.N.Y. Feb. 18, 1992). We affirmed the dismissal, applying the principle of international comity, even though that issue had not been addressed by the district court. *Bi*, 984 F.2d at 586. Similarly, in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (Newman, *J.*), the district court dismissed the two related cases before it solely on the ground of lack of subject matter jurisdiction under the ATCA. *See Doe v. Karadzic*, 866 F. Supp. 734, 736 (S.D.N.Y. 1994). On appeal, however, the parties briefed three different grounds for dismissal, even though two of them had not been addressed by the district court, and Judge Newman considered each of them in turn. *Kadic*, 70 F.3d at 238.

There is a good reason to reach the issue here. Prosecution of these cases undermines significant interests of the United States and our relations with the Republic of South Africa, as well as allies of the

United States, who have expressed concern over the exercise of jurisdiction over these cases. Under these circumstances, it is an issue that should be resolved at the threshold. Particularly apposite here are the words of the Court of Appeals for the Seventh Circuit addressing a motion to dismiss a Sherman Act claim on the ground that the conduct alleged did not have a substantial effect on commerce within the United States. (The "effect on commerce" requirement was enacted as part of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA").) In holding that subject matter jurisdiction was implicated, the Seventh Circuit observed:

> There are good policy reasons for [this conclusion]. The extraterritorial scope of our antitrust laws touches our relations with foreign governments, and so, it seems, it is prudent to tread softly in this area. If FTAIA sets out an issue on the merits, resolution of the issue could be delayed until late in the case, and the potential for a lawsuit to have an effect on foreign markets would exist while the case remained pending. ... Treating the matter as one of subject matter jurisdiction reduces the potential for offending the economic policies of other nations. In short, FTAIA limits the power of the United States courts (and private plaintiffs) from nosing about where they do not belong. And the power of the courts is precisely what subject matter jurisdiction is about.

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*United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 952 (7th Cir. 2003); *see also In re BDC 56 LLC*, 330 F.3d 111, 118 (2d Cir. 2003) (finding that a particular issue was jurisdictional because it implicated "a threshold determination that should be made at the earliest possible stage of the proceedings").

While I rely on these cases simply to demonstrate the force of the policy favoring the exercise of our discretion to decide this issue, they also support the argument that the issue here should be treated as one going to subject matter jurisdiction – which we must resolve – even if it would not necessarily be so treated in other contexts. This argument derives from the language of the ATCA and the Supreme Court's analysis of the manner in which the threshold jurisdictional question should be resolved. Specifically, *Sosa* stated that "[a]ll Members of the Court agree that § 1350 is only jurisdictional" and "that the jurisdiction was originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority." 542 U.S. at 729.

The Supreme Court then observed that "it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms ...." *Id.* at 730. *Sosa* went on to discuss "the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350," *id.* at 732, while making it clear that the criteria it was setting forth were not exclusive. One consideration "involve[s] an element of judgment about the practical consequences of making that cause available to litigants in the fed-

eral courts." *Id.* at 732-33. Since subject matter jurisdiction under the ATCA depends on whether the defendants have violated an international law norm *which federal courts are prepared to recognize, accept and make available to litigants*, the application of the criteria for making that determination is one that by definition goes to the issue of subject matter jurisdiction.

The *per curiam* opinion argues that subject matter jurisdiction under the ATCA is established simply by virtue of an allegation that the defendant's conduct violated a norm of international law and that the decision to provide a remedy for the alleged violation simply relates to the issue of "whether a cause of action exists." *Per Curiam* Op. *ante* at 19. The latter issue, this argument continues, does not implicate subject matter jurisdiction. *Id. ante* at 19-20. While this may be so with respect to 28 U.S.C. § 1331, which confers jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States," the *per curiam* opinion ignores the language of the ATCA, which is one of a number of statutes in which "Congress has exercised its prerogative to restrict the subject-matter jurisdiction of federal district courts based on a wide variety of factors, some of them also relevant to the merits of a case." *Arbaugh v. V & H Corp.*, 546 U.S. 500, 516 n. 11 (2006). Where Congress has done so, subject matter jurisdiction turns on whether the complaint states a cause of action. *See id.* at 515-16 ("If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will

not be left to wrestle with the issue.").[3] Indeed, in *Members For a Better Union v. Bevona*, 152 F.3d 58 (2d Cir. 1998), we vacated a judgment entered after trial for failure of the complaint to state a cause of action, *id.* at 61, without regard to the trial record and the assertion of the parties "that the district court had subject matter jurisdiction." *Id.* at 67 n. 1.[4]

More significantly, even before *Sosa* reaffirmed the jurisdiction-conferring nature of the ATCA, we "distinguish[ed] [the] Alien Tort Claims Act, with its jurisdictional pleading requirement, from general federal question jurisdiction, which is 'not defeated by the possibility that the averments in the complaint may fail to state a cause of action.'" *Bigio*, 239 F.3d at 447 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 887-88 (2d Cir. 1980) (citing *Bell v. Hood* 327

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[3] The jurisdictional statutes cited by the Supreme Court as examples in which Congress has exercised its prerogative to restrict the subject matter jurisdiction of federal district courts include statutes that contain jurisdiction-conferring language identical to that in 28 U.S.C. § 1350. *See, e.g.*, 28 U.S.C. §§ 1345 & 1348 (cited in *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 n.11 (2006)). Indeed, in *Robinson v. Government of Malaysia*, 269 F.3d 133 (2d Cir. 2001), in which Judge Katzmann concurred, we said that the "Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, which provides that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States,' similarly identifies certain substantive law violations as jurisdictional pleading requirements." *Id.* at 144 n.13.

[4] The statute at issue in *Bevona*, section 102 of the Labor-Management Reporting and Disclosure Act, 28 U.S.C. § 412, did not by its terms restrict the exercise of subject matter jurisdiction. Nevertheless, we held that it had been so construed by the Supreme Court. *Bevona*, 152 F.3d at 62 (citing *Calhoon v. Harvey*, 379 U.S. 134, 138 (1964)).

U.S. 678 (1946))). Indeed, as early as the very "birth of the modern line of cases" construing the ATCA, Sosa, 542 U.S. at 724-25, we acknowledged that, because of "the statute's requirement of alleging a '*violation* of the law of nations' ... at the jurisdictional threshold[,] [c]ourts have ... engaged in a more searching preliminary review of the merits than is required, for example, under the more flexible 'arising under' formulation." *Filartiga*, 630 F.2d at 887-88 (comparing *O'Reilly de Camara v. Brooke*, 209 U.S. 45, 52 (1907) (question of ATCA jurisdiction disposed of "on the merits") (Holmes, *J.*), with *Bell*, 327 U.S. 678 (general federal question jurisdiction not defeated by the possibility that the averments in the complaint may fail to state a cause of action)) (emphasis in original); *accord Kadic*, 70 F.3d at 238; *Bigio*, 239 F.3d at 447. After *Sosa*, "a more searching preliminary review of the merits" necessarily includes determining whether the plaintiffs have adequately pled a violation of the law of nations over which it is appropriate for the district court to exercise subject matter jurisdiction.

Again, even if I am wrong on this score, we should consider the issue of case-specific deference at this juncture because "the continued adjudication of the ... matters risks potentially serious adverse consequences for significant interests of the United States,", A01090, threatens our relations with the Republic of South Africa, and poses "continuing tensions in our relations" with the other countries where many of the defendants are incorporated A01091. Just as the Seventh Circuit treated the FTAIA as a jurisdictional statute in order to avoid "offending the economic policies of other nations" during the pendency of the case, *United Phosphorous*, 322 F.3d at 952, we should do so here.

Moreover, the *per curiam* opinion offers no good reason for failing to do so. It suggests that its "approach is particularly appropriate here because plaintiffs have indicated that, if given the opportunity, they would narrow their claims and clarify the nature of their allegations against various defendants, changes that may affect how the district court ultimately decides to resolve these issues." *Per Curiam* Op. *ante* at 13-14 (citing Tr. 7-8, 14-15). The Khulumani plaintiffs, however, did not seek leave to file an amended complaint and Judge Sprizzo has previously granted the Ntsebesa and Digwamaje plaintiffs leave to file a second amended complaint alleging that the defendants aided and abetted the violation of norms of customary international law.[5] Moreover, the *per curium* opinion does not identify a single flaw in the current complaints that would need to be cured by an amended complaint, and the transcript of the oral argument does not reflect any offer by the plaintiffs to amend their complaints in any significant way. Indeed, the plaintiffs expressly argued against the standard that Judge Katzmann adopts in section II.B of his concurring opinion (which I have joined) for imposing liability on the defendants for aiding-and-abetting in violation of the norm of international law.

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[5] On April 28, 2003, before *Sosa* was decided, Judge Sprizzo permitted the Ntsebeza plaintiffs to file a third amended complaint. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 544 n.8. While some defendants received a copy of such a complaint on May 19, 2003, Joint Motion at 5 n.2, "[t]hat Complaint was never properly filed." *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 544 n.8. Nevertheless, it was virtually identical to the one previously filed. *Id.*

Nevertheless, relying on the amended complaints that the plaintiffs may be permitted to file, the *per curiam* opinion declines "to determine whether the plaintiffs have adequately pled a violation of international law sufficient to avail themselves of jurisdiction under the ATCA ..." *Per Curiam* Op. *ante* at 10. The *per curiam* opinion does so in the face of our holding in *Bigio* that the failure to properly plead a violation of the law of nations means that "neither [the district court] nor we may consider the matter further ...." 239 F.3d at 447. Instead of upholding its obligation to determine whether subject matter jurisdiction exists, *see In re MTBE*, 488 F.3d at 121-22, the *per curium* opinion offers up an advisory opinion that a plaintiff may allege that a private party aided and abetted a violation of a norm of customary international law without so much as a reference to the factual allegations in the complaint or citation to the specific norm.

Under these circumstances, it is difficult to understand the disposition of the appeal, a judgment that "vacate[s] the district court's order denying plaintiffs' motion for leave to amend." *Per Curiam* Op. *ante* at 9. The majority does say that, "[i]n denying this motion, the district court relied, in part, on the erroneous premise that subject mater jurisdiction did not inhere and reasoned that any additional amendments to the pleadings would be futile." *Id.* I pass over the incomplete and inaccurate description of the grounds for the denial of the motion to amend.[6]

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[6] Judge Sprizzo denied the motion to amend because (1) he had previously provided the plaintiffs leave to replead; (2) the plaintiffs' request came "four months after this Court dismissed these actions and more than three months after plaintiffs noticed their appeal"; (3) allowing them to replead would interfere

Nevertheless, I do not understand how the majority can say that Judge Sprizzo denied the motion to amend the complaint on the "erroneous premise" that subject matter jurisdiction was lacking, while declining to rule on the basic jurisdictional issue of whether the plaintiffs "have adequately pled a violation of international law sufficient to avail themselves of jurisdiction under the ATCA." *Id.* at 10.

I decline to join in this peculiar disposition, by which my colleagues seek desperately to avoid the easiest ground on which to resolve this appeal – that of deference to the judgment of the Republic of South Africa, supported by our State Department, that these cases are none of our business – and go on to grapple unnecessarily with difficult issues relating to the ATCA and customary international law without being able to agree on the rationale for the result they reach. Nevertheless, since the majority has chosen to do so, I address the issue whether the scope of liability for violations of the international law norms at issue here extends to private actors, such as corporations, for aiding-andabetting. I then turn to the separate opinions of Judges Hall and Katzmann.

**2. The Scope of Liability Under the ATCA**

*Sosa* indicates that this inquiry requires consideration of two separate principles. First, the Court held that the ATCA should not be read to create jurisdiction over "violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." 542 U.S.

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with "ensuring a speedy appeal"; and (4) the proposed amendments would have been "fruitless" in light of his ruling that aiding-and-abetting is not recognized under the ATCA. A01139.

at 732. Second, the Court observed that "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Id.* at 732 n.20. To that end, immediately thereafter, the Court contrasted two opinions, one finding no consensus that torture by a private actor violated international law, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, *J.*, concurring), another finding such a consensus that genocide by a private actor did violate international law, *Kadic*, 70 F.3d at 239-41. Justice Breyer, in a separate opinion, agreed with the Court that the international law norm invoked "must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue." *Sosa*, 542 U.S. at 760 (Breyer, *J.*, concurring in part and concurring in the judgment) (citing *id.* at 732 n.20).

As did the Supreme Court in *Sosa*, we have held that, "[i]n order to determine whether the offenses alleged by the [plaintiffs] in this litigation are violations of the law of nations that may be the subject of Alien Tort Act claims against a private individual, we must make a *particularized examination of these offenses ....*" *Kadic*, 70 F.3d at 241 (emphasis added). In that case, Judge Newman then proceeded to engage in such an exercise. *Id.* at 241-44 (discussing independently genocide, war crimes, and torture and summary execution). More recently, in *Wiwa*, we reiterated our holding in *Kadic* that "the ATCA reaches the conduct of private parties provided that their conduct is undertaken under the color of state authority or violates a norm of international law that is recognized as extending to the conduct of private parties." 226 F.3d at 104.

These holdings are consistent with the position of the European Commission, which clearly influenced Justice Souter's majority opinion and Justice Breyer's concurrence in *Sosa*. Specifically, in its *amicus* brief in *Sosa*, the Commission urged the Supreme Court to hold, as it ultimately did, that in determining whether a non-state actor was complicit in a violation of customary international law by a state actor, courts should apply international, rather than domestic, legal standards. 2004 WL 177036, at *4. Significantly, and again consistent with our holding in *K.dic*, the Commission argued that only a subset of norms recognized as customary international law applies to non-state actors and "hence only that subset may form the basis of liability against such actors. For example, non-state actors may be liable for genocide, war crimes, and piracy, while torture, summary execution, and prolonged arbitrary detention do not violate the law of nations unless they are committed by state officials or under color of law." *Id.* at * 11 (citations omitted).

Consistent with this analysis, I first address whether the complaint here makes allegations against defendants sufficient to hold them liable as acting under the color of law. I next turn to whether, at the time the alleged crimes were committed, there was a well established and universally recognized international norm providing for liability of private parties who aid and abet apartheid. Finally, while officers and employees of a corporation may be held responsible for using the entity as the vehicle for the commission of crimes against humanity, I address the issue whether the entities themselves may be held responsible.

### (a) Private Party Liability under Color of Law

Judge Sprizzo held that the allegations against the defendants were not sufficient to "elevate them to the status of state actors ...." *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 548-49. This aspect of his decision is challenged in the briefing of only one group of appellants. The state action element derives from the principle that violations of international human rights norms, including apartheid, are violations of customary international law only if practiced, encouraged, or condoned by the government of a state as a matter of state policy. *Restatement (Third) of Foreign Relations Law* § 702 & cmt. b (discussed in *Sosa*, 542 U.S. at 737). *See United States v. Josef Altstoetter ("The Justice Case")*, 3 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* 954, 982 (William S. Hein & Co., Inc. 1997) (1947) (Crimes against humanity committed against German nationals are subject to punishment "only where there is proof of conscious participation in systematic government organized or approved procedures ....").[7] Indeed, this explains why *Sosa* specifically held that, before jurisdiction is accepted over an ATCA cause of action against a private actor, it must

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[7] The ICTY held recently that "[w]hile this may have been the case during the Second World War ... the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory." *Prosecutor v. Tadić*, 36 I.L.M. 908, 945, Case No. IT-94- 1-T, Opinion and Judgment ¶ 654 (Trial Chamber May 7, 1997); *see also* Antonio Cassese, *Crimes Against Humanity*, in Cassese et al., *supra*, at 353, 357.

be determined "whether international law extends the scope of liability for a violation of a given norm to ... a private actor ...." 542 U.S. at 732 n.20. *Cf. Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999) (linking the color-oflaw element of 42 U.S.C. § 1983 to the underlying state-action requirement of the Fourteenth Amendment, and holding that both exclude from their reach "merely private conduct, no matter how discriminatory or wrongful") (internal quotation marks and citation omitted).

We have held that case law construing 42 U.S.C. § 1983 is "a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act." *Kadic*, 70 F.3d at 245. As Judge Newman observed,"[a] private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid." *Id.* (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). Subsequently, the Supreme Court has cautioned that the language from *Lugar*, which Judge Newman paraphrased, "must not be torn from the context out of which it arose," *Sullivan*, 526 U.S. at 58, namely, an *ex parte* application for a writ of attachment. This admonition is a useful reminder that the "under color of law" cases arise in varying contexts. Many, including cases on which plaintiffs rely, have been limited to their facts. *Id.* at 55-59.

Perhaps the largest single category of cases under color of law are those in which the primary offender or tortfeasor is a private party, and the issue turns on whether "seemingly private behavior 'may be fairly treated as that of the state itself.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Met. Edison*

*Co.*, 419 U.S. 345, 351 (1974)). Because the cases on this appeal do not fit in this category, I am reluctant to discuss them in detail. Nevertheless, because plaintiffs rely on general language from the cases "torn from the context out of which it arose," *Sullivan*, 526 U.S. at 50, I borrow from Professor Schwartz's treatise, first, one significant caveat, and second, his useful synthesis of the Supreme Court's holdings in this area.

The caveat is that, in analyzing the large body of decisional law concerning state action, "it is important to consider the era in which the decision was rendered." 1 Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* § 5.12, at 5-85 (4th ed. 2003). Professor Schwartz explains that the Warren Court took an expansive view of state action in its effort to combat racial discrimination in society, but that the subsequent Burger and Rehnquist Courts reversed this trend in order to shield private behavior from the reach of the Constitution. *Id.* § 5.12, at 5-85–5-86. This reversal was undertaken not by explicitly overturning any earlier state-action decisions, but through a series of decisions finding no state action despite heavy government involvement in private conduct. *Id.* § 5.12, at 5-86. The unmistakable messages sent by these decisions are that the concept of state action is to be given only limited berth, and that federal courts must assess the continued vitality of earlier state-action precedents in light of more recent decisional law. *Id.*[8]

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[8] *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), which provides the basis for the so-called "symbiotic relationship test" between public and private actors and upon which plaintiffs rely, was one of the Warren Court cases that took an expansive view of state action. The Supreme Court did

Professor Schwartz then supplemented this perceptive analysis by stating the principles that have emerged as the Supreme Court has narrowed the scope of its state-action jurisprudence:

> 1. Mere state regulation of private conduct, even if extensive, is insufficient to support a finding of state action.
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> 2. State authorization of private conduct does not make the private party a state actor; to find state action, the state must participate in, coerce, or significantly encourage the contested activity.
>
> 3. State assistance to a private party, even if substantial, will not support a finding of state action, whether that assistance is in the form of direct financial aid, tax exemptions, monopoly power, government mortgage insurance, or the grant of a license.
>
> 4. The mere importance of the function carried out by the private sector is an insufficient basis

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not employ the "symbiotic relationship" language in *Burton*, though in a subsequent case, it referred to "the symbiotic relationship between lessor and lessee ... present in *Burton*." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972). "Although neither *Burton* nor the symbiotic relationship doctrine has been overruled, they have been severely narrowed in scope and diminished as precedent. Supreme Court decisional law has given *Burton* a very narrow interpretation and, with the possible exception of its decision that a civil litigant's exercise of a racially based peremptory challenge constitutes state action [*Edmondson v. Leesville Concrete Co.*, 500 U.S. 614 (1991)], has rejected every attempt to establish state action on the basis of *Burton*." 1 Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* § 5.13[A], at 5-90–5-9 1 (4th ed. 2003); *see also Sullivan*, 526 U.S. at 57-58; Laurence Tribe, *American Constitutional Law* § 18-3, at 1701 n.13 (2d ed. 1988).

> upon which to find state action; for state action to be found, the function must be historically, traditionally, and exclusively governmental.

*Id.* § 5.12, at 5-87–5-88 (footnotes omitted). Professor Schwartz continues,

> [t]he Supreme Court in some cases has found no state action, even when all four of these government involvements coalesced in the same case. Thus, the Court has found on more than one occasion that an entity was not engaged in state action even though it was extensively regulated, obtained governmental approval, received substantial governmental assistance, and performed an important societal function.

*Id.* § 5.12, at 5-88 (citing *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522 (1987); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974)).

In analyzing the subgroup of state-action cases of which the instant cases are representative – those where the primary offender or tortfeasor is a state actor, and the question is whether a private party who is alleged to be an accessory may be deemed a state actor – it is useful to discuss the facts of the leading Supreme Court cases because they illustrate the kind of showing that must be made before a private party may be deemed a state actor in this context. The case most directly on point is *Dennis v. Sparks*, 449 U.S. 24 (1980), in which a private party bribed a judge to issue an order enjoining the pro-

duction of minerals from certain oil leases. In holding that the private actor was acting "under color of law," the Supreme Court observed that "[p]rivate persons, jointly engaged with state officials in a challenged action, are acting 'under color' of law for purposes of § 1983 actions." *Id.* at 24. Specifically, "the allegations were that an official act of the defendant judge was the product of a corrupt conspiracy involving bribery of the judge. Under these allegations, the private parties conspiring with the judge were acting under color of state law; and it is of no consequence in this respect that the judge himself is immune from damages liability." *Id.* at 28. On the other hand, if the private actor had merely resorted to the courts and prevailed in the lawsuit, he would not have been acting under color of law.

*United States v. Price*, 383 U.S. 787 (1966), which arose out of one of the saddest episodes of the civil rights movement, provides another compelling example of this subgroup. *Price* involved the arrest and subsequent murder of three civil rights workers in Mississippi. The facts are described as follows in the opinion of the Court:

> On June 21, 1964, Cecil Ray Price, the Deputy Sheriff of Neshoba County, Mississippi, detained Michael Henry Schwerner, James Earl Chaney and Andrew Goodman in the Neshoba County jail located in Philadelphia, Mississippi. He released them in the dark of that night. He then proceeded by automobile on Highway 19 to intercept his erstwhile wards. He removed the three men from their automobile, placed them in

> an official automobile of the Neshoba County Sheriff's office, and transported them to a place on an unpaved road.
>
> These acts, it is alleged, were part of a plan and conspiracy whereby the three men were intercepted by the 18 defendants, including Deputy Sheriff Price, Sheriff Rainey and Patrolman Willis of the Philadelphia, Mississippi, Police Department. The purpose and intent of the release from custody and the interception, according to the charge, were to "punish" the three men. The defendants, it is alleged, "did wilfully assault, shoot and kill" each of the three. And, the charge continues, the bodies of the three victims were transported by one of the defendants from the rendezvous on the unpaved road to the vicinity of the construction site of an earthen dam approximately five miles southwest of Philadelphia, Mississippi.

*Id.* at 790. The Supreme Court held that private individuals who participated directly with state actors pursuant to a common design were acting under color of law. "In effect, if the allegations are true, they were participants in official lawlessness, acting in willful concert with state officers and hence under color of law." *Id.* at 795. *Price* is a classic example of the rule that private parties act under color of law when they are "engaged in a conspiracy with state officials to violate the Fourteenth Amendment." *Con-*

*way v. Vill. of Mount Kisco*, 750 F.2d 205, 214 n.12 (2d Cir. 1985) (Oakes, J.); *accord Ginsberg v. Healey Car & Truck Leasing, Inc.*, 189 F.3d 268, 272-73 (2d Cir. 1999); *Alexis v. McDonald's Rests. of Mass. Inc.*, 67 F.3d 341, 352 (1st Cir. 1995); *Mershon v. Beasley*, 994 F.2d 449, 451 (8th Cir. 1993); *Annunzicto v. The Gan, Inc.*, 744 F.2d 244, 251 (2d Cir. 1984).

There is good reason to require direct participation with a state actor pursuant to a conspiracy or common design before holding a private party, who is not the primary wrongdoer, liable as a state actor. Where the issue is whether a public official can be held liable for the primary wrongdoing of a private actor, the public office he holds suffices to satisfy the state-actor requirement; the only issue is whether his conduct in that capacity constitutes a proximate cause of the plaintiff's injury. Thus, "a state actor may be subject to liability for an action physically undertaken by private actors in violation of the plaintiff's liberty or property rights if the state actor directed or aided and abetted the violation." *Dwares v. City of New York*, 985 F.2d 94, 98 (2d Cir. 1993). On the other hand, where the primary actor is a public official, for a private actor to be deemed a state actor, he must jointly participate in the wrongful conduct, pursuant to a common design or plan. As the Supreme Court explained in *Adickes v. S.H. Kress & Co.*, "[t]he involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights .... Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983." 398 U.S. 144 , 152 (1970).

This holding finds support in the law of agency. "When two persons engage jointly in a partnership for some criminal [or legitimate] objective, the law deems them agents for one another. Each is deemed to have authorized the acts and declarations of the other undertaken to carry out their joint objective." *United States v. Russo*, 302 F.3d 37, 45 (2d Cir. 2002). Thus, a private party who conspires with a state actor becomes his agent, and his actions in that capacity are sufficient to make him an actor under color of law. Similarly where a private party induces an otherwise innocent public official to commit an offense, he has effectively made that person his or her agent.

> This doctrine is an outgrowth of common law principles of criminal responsibility dating at least as far back as *Regina v. Saunders*, 2 Plowd. 473 (1575); and of principles of civil responsibility established, by force of the maxim *qui facit per alium facit per se* [he who acts thorough another acts for himself], at least as early as the 14th century.

*United States v. Lester*, 363 F.2d 68, 72 (6th Cir. 1966). On the other hand, there is no legal framework or precedent for holding that a private party, merely selling goods or materials to a state actor, is himself acting under color of law.

Consistent with this precedent, we have held that a conspiracy to violate an international law norm is necessary to render a private party liable for conduct in which the state is the primary actor. *Bigio*, 239 F.3d at 447. Indeed, there we rejected a cause of action alleging that Coca-Cola Co. was acting "under

color of law" where there was "no allegation in the complaint, let alone any hint of evidence ... that Coca-Cola had any role as a participant or co-conspirator in the confiscation of the Bigios' property." *Id.* at 449; *cf. In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 841 (2d Cir. 1992) (holding that joint participation pursuant to an agreement – express or implied – to commit a tort is necessary to impose liability on those acting in concert); *Restatement (Second) of Torts* § 876(a) (imposing liability on one who "does a tortious act in concert with the other or pursuant to a common design with him").

Neither Judge Katzmann nor Judge Hall takes issue with my analysis of section 1983 cases defining circumstances under which a private party may be deemed to have acted under color of law. Judge Katzmann, however, relying on cases applying the general criminal aiding-and-abetting statute applicable to all federal crimes, 18 U.S.C. § 2, argues that a private person may be liable for aiding-and-abetting a public official in the commission of a crime even though he may be incapable of committing the crime himself and even though his conduct would not satisfy the standard set out in § 1983 for treating him as a state actor. Op. of Judge Katzmann *ante* at 47 (citing *In re Nofziger*, 956 F.2d 287, 290 (D.C. Cir. 1992); *United States v. Tannenbaum*, 934 F.2d 8, 14 (2d Cir. 1992)). The fact that a person may be convicted of aiding-and-abetting an offense of which he could be found guilty as a principal - because Congress has so provided - does not provide a basis for imposing such liability in the present context. Because Congress has not enacted a comparable civil aiding-and-abetting statute, a private party could not be subject to such liability in a civil action under

42 U.S.C. § 1983. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181-82 (1994).

Significantly, when Congress enacted the Torture Victims Protection Act of 1991 ("TVPA") to comply to with the Torture Convention, it provided for civil causes of action *only* against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation," undertakes conduct prohibited by the Act. TVPA § 2(a), Pub. L. No. 102-256, 106 Stat. 73 (1992). Moreover, the Senate Report accompanying the legislation provides that "[c]ourts should look to principles of liability under U.S. civil rights laws, in particular section 1983 of title 42 of the United States Code, in construing 'under color of law' as well as interpretations of 'actual or apparent authority' derived from agency theory in order to give the fullest coverage possible." S. Rep. 102- 249, at 8 (Nov. 26, 1991). To the extent that the Senate Report speaks to the issue of aiding-andabetting, it addresses the issue of supervisory liability and makes the point that "a higher [public] official need not have personally ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts [to] anyone with higher authority who authorized, tolerated, or knowingly ignored those acts." *Id.* at 9 (citing *In re Yamashita*, 327 U.S. 1; *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987)); *see also Colon v. Coughlin*, 58 F. 3d 865, 873 (2d Cir. 1995) (applying the same general principles to determine the liability of supervisory public officials under 42 U.S. §1983).

Indeed, notwithstanding the division on the panel with respect to other issues, the *per curiam* opinion,

reflecting the agreement of all members of the panel, holds that the allegations in the complaint are insufficient to render the defendants liable under the color of law for violation of the TVPA. Specifically, it rejects the cause of action under the TVPA, alleging that the defendants "aided and abetted the apartheid regime's subjecting the Plaintiffs to torture and extra judicial killing within the meaning of the [TVPA] ... under actual or apparent authority, or under color of law." A-00505. Applying principles of liability under section 1983, the *per curiam* opinion properly concludes that the complaint "failed to link any defendants to state aid or the conduct of state officials." *Per Curiam* Op. *ante* at 8. The same is true with respect to the other causes of action.

Nevertheless, even if 18 U.S.C. § 2 applied in this context, the standard for imposing liability for aiding-and-abetting pursuant to this section is not satisfied by the complaints in this case. Specifically, the Supreme Court has held that, "[i]n order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (internal quotation marks and citation omitted). This element is also essential to a civil cause of action for aiding-and-abetting. *See, e.g., E. Trading Co. v. Refco*, 229 F.3d 617, 623 (7th Cir. 2000) (Posner, *J.*) (observing "that one who aids and abets a fraud, in the sense of assisting the fraud and wanting it to succeed, is himself guilty of fraud"). Indeed, in *United States v. Blankenship*, Judge Easterbrook, after citing to the Model Penal Code for the proposition that a "supplier [is] culpable only if he has 'the purpose of promoting

or facilitating' the crime," observed that a similar approach has been adopted to aiding-and-abetting in civil cases. 970 F.2d 283, 286 (7th Cir. 1992). Moreover, in *Boim v. Quranic Literacy Institute*, the same court held that 18 U.S.C. § 233 9A, which created a civil cause of action for those injured by terrorist acts against individuals who provided support to terrorist groups, survived a First Amendment challenge "so long as the plaintiffs are able to prove that the defendants knew about the organization's illegal activity, desired to help that activity succeed and engaged in some act of helping." 291 F.3d 1000, 1028 (7th Cir. 2002). *Cf. Halberstam v. Welch*, 705 F.2d 472, 488 (D.C. Cir. 1983) (holding that "desire to make the venture succeed" is a factor in determining aiding-andabetting liability).

There is no allegation here that the defendants acted with the intent to make the violation succeed. On the contrary, plaintiffs strenuously argued in their briefs and at oral argument that they were not required to make such a showing. Ntsebesa Reply Br. at 19; Khulumani Reply Br. at 11; Tr. at 13. They argue that a private party who knowingly facilitates the commission of an international law violation by a state actor acts under color of law. I use the term "facilitates" because "[o]ne who merely sells goods to a buyer is not an aider and abettor of crimes that the buyer might commit, even if the seller knows that the buyer is likely to use the goods unlawfully, because the seller does not share the specific intent to further the buyer's venture." *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1027 (W.D. Wash. 2005) (citing *Blankenship*, 970 F.2d at 285-87), *aff'd* on other grounds, *Corrie v. Caterpillar, Inc.*, _F.3d_, 2007 WL 2694701 (9th Cir. Sept. 17, 2007); *see also* N.Y. Penal Code § 115.05 (criminal facilitation). In-

deed, such conduct does not violate customary international law. *See The Ministries Case*, 14 *Trials of War Criminals Before the Nuern berg Military Tribunals Under Control Council Law No. 10* 621-22.

Nevertheless, plaintiffs suggest that the relevant inquiry is not whether the relationship between the State and the private actor is of a commercial nature, but rather – much like aiding-andabetting under the substantial assistance prong of section 876 of the Restatement (Second) of Torts – whether the private actor had sufficient prior knowledge of the government's plans to commit violations of international law and of the ways in which the goods or services procured by the government would aid in those illicit actions that the private actor can be said to have become party to the government's actions. The issue, however, is not whether the private actor has become "a party to the government's actions" – whatever that means. Instead, it is whether by engaging in this conduct he acted "under color of law." *Adickes*, 398 U.S. at 150; *Ginsberg*, 189 F.3d at 273. A holding that he does, in the circumstances described in the complaints, strains both the phrase and the concept to the breaking point.

**(b)Aiding-and-abetting Liability of Private Parties**

Ordinarily, the fact that the defendants' conduct is not sufficient to hold them liable for acting under color of law would compel the dismissal of the causes of action alleging various crimes against humanity that were not committed during war or an armed conflict. *See Kadic*, 70 F.3d at 244. Nevertheless, Judge Sprizzo identified two potentially applicable international agreements that contemplated liability for private actors. The first and most obvious source

of such liability is the Apartheid Convention, which was expressly drafted to cover all of the conduct of the Union of South Africa that the defendants allegedly aided and abetted. Of this Convention, the Reporters of the Restatement write:

> The Convention [ ] creates obligations beyond those imposed by customary international law. It attaches personal criminal responsibility to all individuals who commit, participate in, incite, abet, encourage or cooperate in the crime. Art. III. The Convention also requires states to suppress, prevent any encouragement of, and punish apartheid. Among parties to the Convention, apartheid is also effectively made a subject of universal jurisdiction. Art. IV.

*Restatement (Third) of Foreign Relations Law* § 702 reporters' note 7. Thus, the Reporters recognize that the Apartheid Convention's imposition of liability on private parties not acting under color of law represented a departure from customary international law.[9] Moreover, while it may be an overstatement to describe the list of countries that have ratified the Convention as a rogues' gallery of human rights violators, the Convention has not been ratified by the United States, most other mature democracies, or

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[9] The Chief Reporter of the Restatement was Professor Louis Henkin of Columbia University. Associated with Professor Henkin as Reporters were Professors Andreas F. Lowenfeld of New York University, Louis B. Sohn of the University of Georgia, and Detlev F. Vagts of Harvard University.

other states that play a significant role in international affairs, including three of the five permanent members of the United Nations Security Council – the United States, the United Kingdom, and France. Indeed, it has not been ratified by the post-apartheid Republic of South Africa. Thus, it is not a persuasive source of customary international law on this point. *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 257 (2d Cir. 2003) (Cabranes, *J.*) ("[T]he more States that have ratified a treaty, and the greater the relative influence of those States in international affairs, the greater the treaty's evidentiary value."). Dean Koh made a similar point in an analogous context when he wrote:

> [T]hose who advocate the use of international and foreign sources in U.S. constitutional interpretation [as he does] are not urging U.S. courts to defer automatically to some kind of global "nose count." Instead, they are suggesting that the practices of other mature democracies – not those that lag behind developmentally – constitute the most relevant evidence of ...the "evolving standards of decency that mark the progress of a maturing society."

Harold Hongju Koh, *International Law as Part of Our Law*, 98 Am. J. Int' l L. 43, 56 (2004). Under these circumstances, for the same reason that the Apartheid Convention is not a source for the exercise of universal jurisdiction, *ante* 90-92, Judge Sprizzo properly rejected it as a source for extending the scope of liability to private actors who aided and abetted apartheid in South Africa.

The other international agreement identified by Judge Sprizzo that expressly recognizes liability for private persons is the Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 ("Genocide Convention"). The near-unanimous adoption of the convention constitutes concrete evidence of a peremptory norm that has become part of customary international law. The problem with the invocation of the Genocide Convention – aside from the issue whether the complaints here sufficiently allege activity constituting genocide – is that when Congress enacted legislation to implement the agreement, *see* Genocide Convention Implementation Act of 1987, Pub. L. 100-606, Nov. 4, 1988, 102 Stat. 3045, *codified at* 18 U.S.C. § 1091 *et seq.*, it expressly provided that the Act shall not "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding." 18 U.S.C. § 1092.

In *Kadic*, which was decided prior to *Sosa*, we held that "the legislative decision not to create a new private remedy does not imply that a private remedy is not already available under the Alien Tort Act." 70 F.3d at 242. As Judge Newman explained:

> Nothing in the Genocide Convention Implementation Act or its legislative history reveals an intent by Congress to repeal the Alien Tort Act insofar as it applies to genocide, and the two statutes are surely not repugnant to each other. Under these circumstances, it would be improper to construe the Genocide Convention Im-

> plementation Act as repealing the Alien Tort Act by implication.

*Id.*

After *Sosa*, however, the issue for us to decide is not whether the Genocide Convention Implementation Act implicitly repealed the ATCA insofar as it applies to genocide. As Judge Katzmann acknowledges, "*Sosa* ... deviate[d] from our case law in one crucial respect. We had allowed cases to proceed under the ATCA on the assumption that when plaintiffs alleged violations of well-established international law, their 'causes of action are statutorily authorized.'" Op. of Judge Katzmann *ante* at 17 (quoting *Kadic*, 70 F.3d at 246). *Sosa* "flatly rejected this notion." *Id.* Instead, we are now required to determine "whether to recognize a common-law cause of action to provide a remedy for the alleged violation" of international law. *Id. ante* at 19. Thus, we have to address the threshold question of whether to recognize a civil cause of action under the ATCA for genocide where Congress has quite plainly indicated its intention that such a cause of action should not be available.

Judge Katzmann appears to acknowledge that, notwithstanding *Kadic*, the issue whether to recognize a cause of action for genocide based on the ATCA must be considered anew in light of *Sosa*. Nevertheless, he would "leave it to the district court to address in the first instance should it undertake to decide whether to recognize a cause of action." Op. of Judge Katzmann *ante* at 51 n.32. Judge Katzmann goes on to suggest to him that such a cause of action should be recognized. *Id.* Instead of deciding an issue that we should and must resolve, Judge Katzmann's

disposition of this issue invites a game of ping-pong with Judge Sprizzo, in which I decline to participate.

The Genocide Convention Implementation Act should shut the door to the recognition of a cause of action under the ATCA for violation of the international law norm that it implements, because it would be an abuse of our discretion to expand the scope of ATCA liability to causes of action that Congress indicated its intent to proscribe. We should not "override a clear indication from the political branches that a 'specific, universal, and obligatory' norm against genocide is *not* to be enforced through a private damages action[.]" *Sosa*, 542 U.S. at 749 (Scalia, *J.*, concurring in part and concurring in the judgment).

**(c) Liability of Corporations**

In *Sosa*, the Supreme Court directed federal courts to determine "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or an individual." *Id.* at 732 n.20. Judge Katzmann, who agrees with me that the issue of the scope of liability is governed by international law, draws no distinction between a corporation and an individual. Nor do our decisions in cases invoking jurisdiction under ACTA. Nevertheless, the specific issue of corporate liability under customary international law was not discussed, nor was it raised by the parties, in any of those cases. *See, e.g., Bigio*, 239 F. 3d 440; *Flores*, 414 F.3d 233. Consequently, they are simply not apposite here, because "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

There is a significant basis for distinguishing between personal and corporate liability. Where the private actor is an individual, he is held liable for acts which he has committed and for which he bears moral responsibility. On the other hand, "legal entities, as legal abstractions can neither think nor act as human beings, and what is legally ascribed to them is the resulting harm produced by individual conduct performed in the name or for the benefit of those participating in them or sharing in their benefits." M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 378 (2d ed. 1999). Thus, the issue here is whether an artificial entity that is allegedly used as a vehicle for the commission of a crime against humanity may be held vicariously liable.

The sources evidencing the relevant norms of international law at issue plainly do not recognize such liability. While the London Charter, which created the International Military Tribunal (the "IMT") at Nuremberg, does not explicitly limit its jurisdiction to "natural persons," it seems clear from its language and context that it conferred jurisdiction only over the prosecution of individuals. Specifically, the Nuremberg Tribunal was empowered "to try and punish *persons* who, acting in the interests of the European Axis countries, whether as *individuals* or as *members* of organizations," committed any of several enumerated crimes. Charter of the IMT art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (the "London Charter" or the "Charter") (emphasis added).[10] More-

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[10] Article 9 of the London Charter provided that "[a]t the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of

over, in rejecting the defense argument that "international law is concerned with the actions of sovereign states, and provides no punishment for individuals," the Nuremberg Tribunal held that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *The Nuremberg Trial*, 6 F.R.D. 69, 110 (1946); 1 *Trial of the Major War Criminals* 223 (William S. Hein & Co., Inc. 1995) (1947). *See also* Ernst Schneeberger, *The Responsibility of the Individual under International Law*, 35 Geo. L. J. 481, 489 (1947) ("[I]n the last resort responsibility under international law can only be responsibility of an individual ....").

Indeed, the distinction between corporate and individual responsibility is illustrated by *The I. G. Farben Case* in which corporate officers were charged with "acting through the instrumentality of Farben" in committing various crimes against humanity. *United States v. Krauch ("The I. G. Farben Case")*,7 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* 14, 39, 50, 59 (1952). Nevertheless, the notorious I.G. Farben was not named as a defendant. *Id.* at 11-14. Nor were any other corporations charged with crimes at Nuremberg. "In fact, in the Nuremberg trials, this point of lack of corporate liability appeared to have been explicitly stated." *In re Agent Orange Product*

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which the individual was a member was a criminal organization." 1 *Trial of Major War Criminals* 255-57. The consequence of a finding in the main trial that organizations, such as the Schultzstaffeln (more commonly referred to as the S.S.) and the Gestapo, were criminal in nature was that it permitted a finding of guilt against other members of the organization in subsequent trials. *See The Nuremberg Trial*, 6 F.R.D. at 131-33.

*Liab. Litig.*, 373 F. Supp. 2d 7, 57 (E.D.N.Y. 2005) (Weinstein, *J.*).

In 1948, the United Nations General Assembly asked the International Law Commission (the "ILC"), a United Nations body, to study the possibility of creating an international judicial tribunal, which ultimately emerged in the form of the International Criminal Court (the "ICC"), to prosecute genocide and other crimes. Under the auspices of the ILC, the Committee on International Legal Jurisdiction began to study the issue in 1951, and it released its report in 1953. *See* U.N. GAOR, 9th Sess., Supp. No. 12, U.N. Doc. A/2645 (1954). The Committee considered a proposal by Australia to grant the international court jurisdiction over corporations. *Id.* ¶ 85. The proposal was soundly defeated because "it was undesirable to include so novel a principle as corporate criminal responsibility in the draft statute." *Id.*

More than forty years later, during negotiations for the Rome Statute, pursuant to which the ICC was created, France proposed bringing corporations and other juridical persons (though not States) within the jurisdiction of the ICC. That proposal was again rejected, for three principal reasons: (1) "from a pragmatic point of view it was feared that the ICC would be faced with tremendous evidentiary problems when prosecuting legal entities"; (2) "from a more normative-political point of view it was emphasized that the criminal liability of corporations is still rejected in many national legal orders, and international disparity which could not be brought in concord with the principle of complementarity"; and (3) "it was felt morally obtuse for States to insist on the criminal responsibility of all entities other than themselves." Albin Eser, *Individual Criminal Re-*

*sponsibility, in* 1 Antonio Cassese et al., *The Rome Statute of the International Criminal Court: A Commentary* 767, 778-79 (2002) (footnotes omitted). Thus, the Rome Statute provides for jurisdiction over only "natural persons." The Rome Statute of the ICC art. 25(1), *opened for signature* July 17, 1998, 37 I.L.M. 999, 1016 (entered into force July 1, 2002) ("The Rome Statute").

Similarly, Article III of the Apartheid Convention provides that "[i]nternational criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State ...." Article 4 of the Genocide Convention is to the same effect. Specifically, it provides that "[p]ersons committing genocide or any of the other acts enumerated in [a]rticle 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." The statutes for the International Criminal Tribunal for the former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR") also confer jurisdiction only over "natural persons." *See* Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 art. 25(1), *adopted* May 25, 1993, S.C. Res. 827, U.N. Doc. S/RES/827 (the "ICTY Statute"); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for the Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States Between 1 January 1994 and 31

December 1994 art. 5, *adopted* Nov. 8, 1994, S.C. Res. 955, U.N. Doc. S/RES/955 (the "ICTR Statute").

Likewise, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Torture Convention"), contemplates violations by "persons," which in the agreement's textual context can only mean natural persons. *See* Torture Convention arts. 4(1), 6(1), 6(3), *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027. The language of the TVPA, which executed in part the Torture Convention, *Flores*, 414 F.3d at 247 n.20, provides further support for the fact that customary international law has not recognized corporate liability. Under the TVPA, the term "individual" describes both those who can violate its proscriptions against torture, as well as those who can be victims of torture. Specifically, the TVPA provides that "[a]n individual who ... subjects an *individual* to torture shall ... be liable for damages to that *individual*," and it defines "torture" as "any act, directed against an *individual* ... by which severe pain or suffering ... is intentionally inflicted on that *individual*." *Id.* §§ 2(a)(1), 3(b)(1) (emphasis added). As Judge Weinstein recently wrote:

> [b]oth from context and common sense only natural persons can be the "individual" victims of acts that inflict "severe pain and suffering." *See* [TVPA § 3(b)1]. Because the TVPA uses the same term "individual" to identify offenders, the definition of "individual" within the statute appears to refer to a human being, suggesting that only natural persons can violate the Act. *See Desert Palace,*

> *Inc. v. Costa*, 539 U.S. 90, 101, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003) (noting that "[a]bsent some congressional indication to the contrary, [courts] decline to give the same term in the same Act a different meaning depending on whether the rights of the plaintiff or the defendant are at issue"); *see also Beanal v. Freeport-McMoRan, Inc.*, 969 F.Supp. 362, 381-82 (E.D. La. 1997) ("[T]he plain meaning of the term 'individual' does not ordinarily include a corporation."), *aff'd by* 197 F.3d 161 (5th Cir. 1999).

*In re Agent Orange Product Liab. Litig.*, 373 F. Supp. 2d at 56.

The same is true with respect to the statute making torture committed outside the United States a federal offense. 18 U.S.C. § 2340 *et seq.* Section 2340 provides that, "[a]s used in this chapter ... 'torture' means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering ... upon another person within his custody or physical control ...." *Id.* § 2340(1). Because here, as in the TVPA, the context indicates that the word "person" refers to natural persons, the general rule that the word "person" when used in any Act of Congress includes corporations, unless the context indicates otherwise, 1 U.S.C. §1, is not applicable here. *See Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199 (1993) ("'Context' here means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts ....").

These sources are not undermined by Professor Henkin's suggestion that, "[a]t this juncture[,] the Universal Declaration [of Human Rights (G.A. Res. 217A (III), U.N. Doc. A/180 (1948)] may also address multinational companies." Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 Brook. J. Int'l L. 17, 24 (1999). Relying on the Preamble to the Declaration, Professor Henkin argued that it "is 'a common standard for all people and all nations.' It means that 'every individual and every organ of society shall strive – by progressive measures ... to secure their universal and effective recognition and observance among the people of member states.' Every individual includes juridical persons." *Id.* at 24-25. The Supreme Court, however, has held that the Declaration "does not of its own force impose obligations as a matter of international law." *Sosa*, 542 U.S. at 734. Moreover,

> it is [also] important to keep in mind what exactly the Preamble expects of such individuals and organs: that they "promote" respect for the rights set forth in the Declaration by 'teaching and education' and by supporting "progressive national and international measures." The language is thus consistent with the idea that legal obligations bind corporations only to the extent that further "national and international measures" are taken.

Carlos M. Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 Colum. J. Transnat'l L. 927, 942 (2005).

Nor are the sources rejecting corporate liability undermined by two international conventions and a Security Council resolution, all of which post-date the dismantling of apartheid. *See* The United Nations Convention Against Transnational Organized Crime art. 5(1)(b), Jan. 8, 2001, U.N. GAOR, 55th sess., Supp. No. 49, U.N. Doc. A/45/49; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions arts. 1(2) & 2, Dec. 18, 1997, 37 I.L.M. 1 (1998); S.C. Res. 1566, U.N. Doc. S/RES/1566 (Oct. 8, 2004); Mandatory Action to Fight Terrorism, S.C. Res. 1373 ¶ 1(d), U.N. Doc. S/RES/1373 (Sept. 28, 2001); International Convention for the Suppression of the Financing of Terrorism, *adopted* Dec. 9, 1999, G.A. Res. 109, U.N. GAOR 54th Sess., 76th plen. mtg., U.N. Doc. A/RES/54/109, 39 I.L.M. 270 (2000). While each of these sources call upon parties to enact measures to impose some kind of liability on legal persons in accordance with their own domestic legal principles, none of them directly impose any liability on corporations. Without an analysis of the laws enacted by the various signatories, it is impossible to draw any conclusions regarding the practice of states with regard to the issue of the degree of corporate liability for violation of international law norms.[11] Indeed, as Professor Bassiouni has observed, although "contemporary international efforts to deal with organized

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[11] As a general rule, treaties, like contracts, "are legally binding on States that become parties to them by consenting to be bound", and may constitute evidence of a norm of customary international law only if "an overwhelming majority of States have ratified the treaty *and* those States uniformly and consistently act in accordance with its principles." *Flores*, 414 F.3d at 256.

crime, corruption, and drug trafficking" are moving in the direction of corporate liability "these new concepts of corporate criminal responsibility have not yet found their way into [customary international law]." Bassiouni, *supra*, at 377 (internal quotation marks and footnotes omitted). *See also* Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 16 (2d ed. 2001) ("It remains unclear [ ] whether international law generally imposes criminal responsibility on groups and organizations.").

In sum, the issue here is not whether policy considerations favor (or disfavor) corporate responsibility for violations of international law. *Cf.* Carlos M. Vásquez, *Direct v. Indirect Obligations of Corporations Under International Law*, 43 Colum. J. Transnat'l L. 927, 932-959 (2005) (acknowledging that very few norms apply directly to corporations under "international law as it exists today" and outlining arguments for why "international law should move in the direction of generally extending human rights obligations of states to private corporations"). Instead, it involves a determination of what the law was during the relevant period. Indeed, the Supreme Court has held that the retroactive application of statutes enacting civil liability is presumptively inappropriate even where the conduct giving rise to liability was already proscribed and the newly enacted legislation simply increased the scope of liability for damages. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 281-86 (1994).

"[T]he presumption against retroactive legislation is [not only] deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our

Republic," *id.* at 265, but is also reflected in customary international law. As one scholar has noted, "[a] further traditional corollary of the *nullum crimen sine lege* principle – namely, the notion of non-retroactivity – views the principle of legality from a temporal perspective: conduct may be punished only on the basis of a norm that came into force *prior* to when the conduct occurred." Susan Lamb, *Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law*, in Cassese et al., *supra*, at 733, 751 (emphasis in the original). Indeed, "[t]he applicability of the *nullum crimen* principle to serious breaches of international humanitarian law was by 1998 sufficiently well-accepted that its inclusion within the Rome Statute was seen as necessary ...." *Id.* at 755. *See also Prosecutor v. Tadić*, 36 I.L.M. 908, 945, Case No. IT-94-1-T, Opinion and Judgment ¶ 654 (Trial Chamber May 7, 1997) (the International Tribunal "must apply customary international law as it stood at the time of the offences").

Although the precise date on which the heart of the apartheid regime stopped beating may be difficult to pinpoint, the executive order by President George H.W. Bush on July 10, 1991, terminating United States sanctions against the country, provides one guidepost. Exec. Order No. 12,769, 56 Fed. Reg. 31855 (July 10, 1991), *reprinted in* 22 U.S.C. § 5061 (2004). By that order, the President concluded as of that date that the Government of South Africa had: (1) released all persons persecuted for their political beliefs or detained unduly without trial and it also released Nelson Mandela; (2) repealed the state of emergency in effect on the date of enactment of [the "Comprehensive Anti-Apartheid Act of 1986"] and released all detainees held under such state of emergency; (3) unbanned democratic political parties

and permitted the free exercise by South Africans of all races of the right to form political parties, express political opinions, and otherwise participate in the political process; (4) repealed the Group Areas Act and the Population Registration Act and instituted no other measures with the same purposes; and (5) agreed to enter into good faith negotiations with truly representative members of the black majority without preconditions. *See* Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440 § 311(a) (1986). Because the only sources of customary international law that suggest some movement toward the recognition of corporate liability post-date the collapse of the apartheid regime, and because the established norm during the apartheid era was that corporations were not responsible legally for violations of norms proscribing crimes against humanity, the complaints are subject to dismissal on this ground alone.

**3. The Concurring Opinions**

**(a) Judge Hall's Concurring Opinion**

Judge Hall flatly ignores the holding of the Supreme Court that the second consideration in deciding whether to accept jurisdiction over a cause of action alleging a violation of the law of nations "is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 n.20. Instead of undertaking an analysis of a given norm of international law to determine the scope of liability of a private actor, Judge Hall concludes that international law is irrelevant and that once a violation of a given norm is alleged, ATCA subjects a pri-

vate party to liability if he aided-and-abetted that violation.

Judge Hall's concurring opinion is premised on the assumption that, even though the ATCA does not by its terms encompass aiding-and-abetting liability, it should be construed as if it contains such language. This aspect of Judge Hall's opinion not only contradicts *Sosa* and *Kadic*, it does disservice to the holding of the leading Supreme Court case addressing the issue of accessorial liability for violations of statutes that create civil causes of action, *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994). In that case, the Supreme Court observed that:

> Congress has not enacted a general civil aiding and abetting statute – either for suits by the Government (when the Government sues for civil penalties or injunctive relief) or for suits by private parties. Thus, when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.

*Id.* at 182. *Central Bank*, to be sure, only stands for the proposition that when Congress enacts a law creating a private right of action for violation of a statute, "there is no general presumption that the plaintiff may also sue aiders and abettors." *Id.* That decision, however, does not preclude civil liability for aiding-and-abetting in cases "where Congress' intent is clear from the language and structure of the statute

itself as well as from the legislative history." *Boim*, 291 F.3d at 1019.

*Boim*, upon which Judge Hall relies, concerns the issue of liability for aiding-and-abetting international terrorism in violation of 18 U. S.C. § 2333(a). While the statute, creating the civil cause of action, 18 U.S.C. § 2339A, did not in *haec verba* provide for aiding-and-abetting liability, accomplice liability was implicit in the definition of international terrorism. Thus, in distinguishing *Central Bank*, the Seventh Circuit held that:

> Unlike section 10(b) [the statute at issue in *Central Bank*], Congress also expressed an intent in section 2333 to make civil liability at least as extensive as criminal liability. The statute defining "international terrorism" includes activities that "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State." 18 U.S.C. § 2331(1). This language, embracing activities that "involve" violent acts, taken at face value would certainly cover aiding and abetting violent acts. Remember, too, the criminal laws include 18 U.S.C. § 2, which creates liability for aiding and abetting violations of any other criminal provisions. By incorporating violations of any criminal laws that involve violent acts or acts

> dangerous to human life, Congress was expressly including aiding and abetting to the extent that aiding and abetting "involves" violence.

*Id.* at 1020.

The language of the ATCA, like the language of the statute at issue in *Boim*, can support the recognition of a cause of action for aiding-and-abetting. Nevertheless, it does so only if the plaintiff invokes an international law norm that provides for such liability. Nothing in the language of the ATCA supports the broad holding that Congress intended to provide a forum to adjudicate causes of action for aiding-and-abetting the violation of a norm when such conduct did not fall within the scope of the norm. Indeed, the same Congress that enacted the ATCA, without reference to aidingand-abetting liability, explicitly made it a crime to aid-and-abet acts of piracy, a violation of the law of nations. *See* Act of April 30, 1790, ch. 9, § 10, 1 Stat. 112, 114 (1790). This shows that, despite Judge Hall's suggestion to the contrary, Op. of Judge Hall *ante* at 59 n.37, the First Congress "knew how to impose aiding and abetting liability when it chose to do so," *id.* (quoting *Central Bank*, 511 U.S. at 174), with respect to violations of the law of nations.

In the absence of either statutory language or legislative history to support his interpretation of the ATCA, Judge Hall's opinion argues that "the Founding Generation nevertheless understood that ATCA encompassed aiding and abetting liability." Op. of Judge Hall *ante* at 59 n.37. This contention is beside the point, for the reasons discussed above, and it is also wrong. In *Central Bank*, the plaintiff argued that "Congress legislated with an understanding of

general principles of tort law and that aiding and abetting liability was 'well established in both civil and criminal actions by 1934,'" the year the statute at issue was adopted. 511 U.S. at 181 (citation omitted). The Court's opinion suggested that the plaintiff there relied on the principle derived from the Restatement (Second) of Torts (1979), which provides that a person is liable for another's torts if he "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself. ..." Id. § 876(b); *see Central Bank*, 511 U.S. at 181. The principle of "substantial assistance," which Judge Hall adopts, initially appeared in the Restatement (First) of Torts in 1939, of which Prosser wrote:

> The form of the Restatement is perhaps unfortunate, in that it seeks to reduce the law to a definite set of black-letter rules or principles, ignoring all contrary authority – since the law of torts in its present stage of development does not lend itself at all readily to such treatment. There is room for suspicion that the courts have tended to cite the Restatement when they are already in agreement with it, and to ignore it when they are not, so that the impressive list of references to it in the cases may be somewhat misleading; and there are those who have disagreed with many of its conclusions, and even denounced the whole project.

William L. Prosser, *Law of Torts* § 4, at 20-21 (4th ed. 1971).[12] Perhaps for this reason, the Supreme Court could write fifty-five years after the publication of the first Restatement that the doctrine of aiding-and-abetting in civil cases "has been at best uncertain in application ... with the common-law precedents 'largely confined to isolated acts of adolescents in rural society.'" *Central Bank*, 511 U.S. at 181 (quoting *Halberstam*, 705 F.2d at 489). If there was no general understanding that civil aiding-and-abetting liability was "well established in ... civil ... actions by 1934," *id.* at 181 (citation omitted), it is difficult to understand how it can be asserted that such an understanding was present in 1789 when Congress enacted the ATCA.

The historical support for the proposition that "[t]he Founding Generation nevertheless understood that civil liability for aiding and abetting international law violations was contemplated under the ATCA," Op. of Judge Hall *ante* at 59 n.37, is ambiguous at best. The lynchpin for this argument is Attorney General William Bradford's 1795 opinion, *Breach of Neutrality*, 1 Op. Atty. Gen. 57 (1795). In his opinion, Bradford specifically addressed a question posed

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[12] Judge Learned Hand shared Prosser's concern. Hand "repeatedly ... urged that the Restatements confine themselves to articulating the law 'as it is,' not as it should be; repeatedly, he insisted that the ALI' s task was to 'restate, not legislate' ...." Gerald Gunther, *Learned Hand: The Man and the Judge* 411 (1994) (internal citations omitted). Indeed, although Hand was a founding member of the ALI and held major positions in it for the rest of his life, he rarely cited the Restatements. *Id.* at 413. The most that he was willing to say about them was that he found them to be useful " 'on questions which were not controversial and [otherwise took] a long time to look up.' " *Id.* (internal citations omitted).

to him, namely, whether American citizens who "voluntarily joined, conducted, aided, and abetted a French fleet in attacking the settlement, and plundering or destroying the property of British subjects on that coast" could be subject to criminal prosecution in the United States. *Id.* at 58. In responding to this question, Bradford expressed some doubt about a criminal prosecution, but he stated that

> there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations, or a treaty of the United States . . . .

*Id.* at 59.

Because Bradford did not distinguish between primary and secondary liability, it is not possible to discern that, when he said a cause of action would lie for "these acts of hostility," he was focusing on aiding-and-abetting as opposed to direct participation in the conduct that violated a treaty of the United States. Indeed, because the conduct involved direct participation by American citizens, who acted with the intent to make the attack succeed, it seems likely that Bradford recognized all of the perpetrators as joint tortfeasors, as that term was understood at the time. As the D.C. Circuit explained in *Halberstam*:

> Prosser notes that "[t]he original meaning of 'joint tort' was that of vicarious liability for concerted action.

> All persons who acted in concert to commit a trespass, in pursuance of a common design, were held liable for the entire result." W. Prosser, *Law of Torts* § 46, at 291 (4th ed. 1971). His illustration portrays a standard situation that involved this "joint tort": combined action by tortfeasors on the scene together – "one might have battered the plaintiff, while another imprisoned him, and a third stole his silver buttons." *Id.* (footnote omitted). Each was responsible for the others' actions.

705 F.2d at 476-77. Moreover, Prosser goes on to explain that the essential element of a joint tort was "the pursuance of a common plan or design to commit a tortious act." Prosser, *supra*, at 292.

Two early cases cited in Judge Hall's opinion, *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795), and *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793), neither of which involved the ATCA, bear out Prosser' s analysis. Both cases arose from the seizure of a vessel not by pirates, but by privateers, "armed vessels that are owned, equipped and officered by one or more private persons, but sailing under a commission, usually called letters of marque, from a belligerent state, which empowers the person or persons to whom it is granted to attack and seize, at sea, vessels or other property of its enemy." 3 James Fairbanks Conley, *Privateering, in Cyclopædia of Political Science, Political Economy, and the Political History of the United States* 361 (John J. Lalor ed., 1899). The use of privateers in this way was recognized under international law. *Id.* Nevertheless, Tal-

bot's and Henfield's legal problems in these cases derived from the fact that they were United States citizens engaged in acts of war against nations with which the United States was at peace.

*Talbot* was an admiralty case. Talbot himself was the captain of a privateer commissioned by the Republic of France. *Henfield's Case* was a criminal prosecution, and a most unusual one at that, of the prize-master of a privateer also commissioned by France. Henfield was not charged with conduct proscribed by an act of Congress. The undelivered grand jury charge of Chief Justice Jay, upon which Judge Hall relies, Op. of Judge Hall *ante* at 59 n.37, appears to reflect the practice of most of the early justices "to create crimes by judicial fiat[, which] was particularly infuriating to the vast majority of citizens who believed the Constitution had established a government of limited powers." Jean Edward Smith, *John Marshall: Definer of a Nation* 284 (1996). The Supreme Court repudiated the practice in *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812). Under these circumstances, it is not surprising that Henfield, who was not charged with aiding-and-abetting, was acquitted because "he was ignorant of the unlawfulness of his undertaking." *Henfield's Case*, 11 F. Cas. at 1122 n.7. Nor is it surprising, given Henfield's role as a principal (or as a joint tortfeasor in the civil context), that Jay's grand jury charge, which was written to apply "to the class of offenders, of whom Henfield was one," *id.* at 1105 n.2, did not define aiding-and-abetting, and that the judge who actually charged the Henfield grand jury did not allude to the concept altogether. *Id.* at 1105-09.

In sum, Bradford's opinion and the cases cited by Judge Hall do not support the extraordinary proposition that Congress intended the ATCA to permit jurisdiction to be exercised over claims of aiding-and-abetting without regard to whether the conduct at issue violated an international law norm. Moreover, Judge Hall compounds his flawed discussion of this issue by adopting a standard for aiding-and-abetting that is vague and inappropriate in the present context. As if the language of section 876(b) of the Restatement (Second) of Torts imposing liability for "substantial assistance" was not vague enough, he endorses a five-factor test, first suggested by the Restatement and then adopted in *Halberstam*, to "assess whether the defendant's encouragement or assistance was sufficiently substantial to support liability." Op. of Judge Hall *ante* at 58. These factors are "the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other tortfeasor and his state of mind." *Id.*

The "state of mind" factor, as applied in *Halberstam*, includes a "desire to make the venture succeed." 705 F.2d at 488. Nevertheless, despite his reliance on *Halberstam*, Judge Hall's opinion fails to even allude to this critical state-of-mind element. Moreover, even under *Halberstam's* formulation, it is only one factor among five for determining whether "substantial assistance" was provided. Such a five-prong test for determining whether assistance was substantial hardly provides the clear guidance necessary to those engaging in commercial transactions.

By incorporating a vague "substantial assistance" standard, this newly minted theory of aiding-and-abetting liability will create many practical problems

harmful to the political and economic interests of the United States. As the United States observes in its *amicus* brief, the decision to embrace this broader scope of liability under the ATCA will generate tremendous uncertainty for private corporations, who will be reluctant to operate in countries with poor human rights records for fear of incurring legal liability for those regimes' bad acts. Br. for the U.S.A. as *Amicus Curiae* at 13. This uncertainty, in turn, will undermine efforts by the United States to encourage reform in those countries through active economic engagement, *id.*, and will deter the free flow of trade and investment more generally. *Id.* at 18.

**(b) Judge Katzmann's Concurring Opinion**

Unlike Judge Hall, Judge Katzmann looks to international law to resolve the issue of whether a private party or a corporation (he draws no distinction between the two) can be held liable for aiding-and-abetting a violation of international law otherwise applicable to state actors or to private parties acting under color of law. While Judge Katzmann properly looks to international law, he disregards the holding in *Sosa* and our own holdings in *Kadic* and *Wiwa*, which I have already discussed at some length, *ante* at 101-02, that require a norm-by-norm analysis to determine whether "international law extends the scope of liability for a violation of a *given* norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 n.20 (emphasis added). Judge Katzmann declines to undertake this analysis because that "is not how the inquiry is undertaken by international tribunals whose jurisdiction is limited by customary

international law." Op. of Judge Katzmann *ante* at 43.

We do not enjoy the freedom to disregard the guidance of the Supreme Court and adopt the practice of international tribunals – particularly the unorthodox practices of the ITCY and the ICTR, see post at 139-146. Moreover, contrary to Judge Katzmann's suggestion, the jurisdiction of the post-apartheid international tribunals to which he refers, principally the ICTY, are conferred by the Security Council resolutions creating them. They are not "limited by international law." Instead, these custom-made statutes, which address particular international crises are sometimes contrary to evolving norms of customary international law. This is true with respect to the statute creating the ICTY, post at 139, and the UN Security Council Resolution calling for the establishment of the Special Court for Sierra Leone. The latter provides only for the prosecution of persons "who bear the greatest responsibility for the commission of the crimes [in violation of crimes against humanity]. S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000). The resolution was implemented in article 1 of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone.

More significantly, in the cases on which Judge Katzmann relies – those of the ICTY – the tribunal was not required to make any inquiry regarding the issue of whether "international law extends the scope of liability for a given norm to the perpetrator being sued if the defendant is a private actor such as a corporation." *Sosa*, 542 U.S. at 732 n.20.

The Statute of the ICTY, article 5, followed the London Charter, the Judgment of the Nuremberg Tribunal, construing it, and the tribunals empaneled pursuant to CCL 10, all of which required a connection between crimes against humanity and war crimes.[13] Because private parties are individually responsible for crimes committed in the course of a war, this connection made it unnecessary for the Nuremberg Tribunal or the CCL 10 tribunals to address the scope of liability of private actors as aiders-andabetters. *See Kadic*, 70 F.3d at 23 9-41; *see also id.* at 242-43 ("Plaintiffs also contend that the acts of murder, rape, torture, and arbitrary detention of civilians, committed in the course of hostilities, violate the law of war. Atrocities of the types alleged here have long been recognized in international law as violations of the law of war .... The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II."). Thus, ICTY cases provide no support for failing to follow the instruction of the Supreme Court, one that is consistent with our own holding in *Kadic* and *Wiwa*, which requires an analysis of the particular norm the defendant is accused of violating to determine whether a

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[13] *See The Nuremberg Trial*, 6 F.R.D. 69, 131, 1 *Trial of the Major War Criminals* 253-54, Brigadier General Telford Taylor, *Final Report to the Secretary of the Army on the Nuerenberg War Crimes Trials under Control Council Law No. 10*, app. B at 224, 228 (William S. Hein & Co., Inc. 1997) (1949). A useful discussion of art. 6(c) of the London Charter, which provided the basis for these holdings, may be found in Bassiouni, *supra*, 19-30.

private party may be held responsible as an aider-and-abettor.[14]

While Judge Katzmann erroneously concludes that there was – during the period when the crimes alleged here took place – an independent norm of customary international law, making private actors legally responsible as aiders-and-abetters without regard to whether the particular norm they allegedly violated imposed such liability, he correctly rejects the "substantial assistance with knowledge" standard for this newly minted norm that Judge Hall finds in section 876(b) of the Restatement (Second) of Torts. Instead, he "conclude[s] that a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime." Op. of Judge Katzmann *ante* at 3 8-39. The basis for this formulation is article 25 of the Rome Statute. Rome Statute of the ICC, *opened for signature* July 17, 1998, 37 I.L.M. 999, 1016 (entered into force July 1, 2002).

Specifically, article 25 of the Rome Statute provides that a person shall be criminally responsible

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[14] Another reason the ICTY cases are silent on this score is that, while the defendants in these cases may not have been officials of formally recognized states, they were state actors. As we have held, "the state action concept ... requires merely the semblance of official authority. The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists." *Kadic*, 70 F.3d at 245.

and liable for punishment for specified crimes against humanity if that person:

> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> > (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
> >
> > (ii) Be made in the knowledge of the intention of the group to commit the crime;

*Id.* art. 25(3)(c), (d).

This article is significant because it makes clear that, other than assistance rendered to the commission of a crime by a group of persons acting with a common purpose, a defendant is guilty of aiding-and-abetting the commission of a crime *only* if he does so "[f]or the purpose of facilitating the commission of such a crime ... including providing the means for its commission." *Id.* The same standard was adopted by the United Nations Transitional Administration in

East Timor ("UNTAEAT"). *See* UNTAET, June 6, 2000, Reg. No. 2000/15 § 14.3(c). As one commentator has observed:

> With regard to *facilitating* the commission of a crime, the aider and abettor must act with '*purpose*.' ... This means more than the mere knowledge that the accomplice aids the commission of the offence, as would suffice for complicity according to the ICTR and ICTY Statutes, rather he must know as well as wish that his assistance shall facilitate the commission of the crime.

Albin Eser, *Individual Criminal Responsibility, in* 1 *The Rome Statute of the International Criminal Court* 767, 801 (Antonio Cassese et al., eds. 2002) (emphasis in original).

The Rome Statute has been signed by 139 countries and ratified by 105, including most of the mature democracies of the world. I agree that it reflects an international consensus on the issue of the appropriate standard for determining liability for aiding-and-abetting, it is consistent with our own domestic law, *see ante* at 111-12, and it addresses the concern over the adoption of a "substantial assistance with knowledge" standard raised in the *amicus* brief filed by the United States. Br. for the U.S.A. as *Amicus Curiae* at 13. Indeed, the *amicus* brief appears to endorse the elements set out in article 2 5(3). *Id.* at 26 (arguing that "the standard the plaintiffs propose differs materially from the most recent formulations adopted in international practice") (citing article 25(3) of the Rome Statute). Perhaps more significantly, the standard in article 25(3)(c) of the Rome

Statute is consistent with the *Ministries Case*, discussed at the outset, that holds that the conduct which the defendants allegedly engaged in here was not a violation of customary international law. *The Ministries Case,* 14 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* 622. These considerations also obviate any concern regarding the failure of the United States to ratify the Treaty of Rome for reasons unrelated to the definition of aiding-and-abetting. *See Yousef*, 327 F.3d at 92 n.25.

My point of disagreement with Judge Katzmann relates to the narrow issue of whether there was *any* "'well established[] [and] universally recognized" definition of aiding-and-abetting sufficient to be considered customary international law for the purposes of the ATCA during the apartheid era when the defendants allegedly violated customary international law. Op. of Judge Katzmann *ante* at 39. There was none. *See* Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 130 (2d ed. 2001), and the absence of such a definition during this period is significant for the reasons already discussed, *ante* at 125-127.

Nevertheless, I concur in section II.B of his opinion that articulates the customary international law standard for aiding-and-abetting based on the Rome Statute. I do so because it provides a clear standard, adopted by a majority of the panel, for Judge Sprizzo to apply, in deciding whether to grant the plaintiffs' motion to file amended complaints.[15] Moreover, as

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[15] In deciding this motion, Judge Sprizzo should also consider applying the pleading standard enunciated in *Bell Atlantic*

applied to the facts in this case, the standard Judge Katzmann adopts is consistent with the *Ministries Case* – the validity of which has never been questioned.

Judge Katzmann's opinion, however, does not end with section II.B. Thus, while he does not rely on post-apartheid decisions of the ICTY or the ICTR to support the standard that he enunciates for determining aiding-and-abetting liability, he does rely on those cases to suggest that the "substantial assistance with knowledge" standard for aiding-and-abetting may provide a foundation for future development of the law in this area. I discuss the cases on which he relies to demonstrate why, contrary to Judge Katzmann's gratuitous suggestion, they do not provide a reliable basis for a broader definition than the one proscribed in the Rome Statute.

**(a) The ICTY**

By way of background, the ICTY was created by United Nations Security Council Resolution 827, which was passed on May 25, 1993, to prosecute individuals responsible for serious violations of international humanitarian law committed in the former Yugoslavia beginning on January 1, 1991. Under the ICTY Statute, the tribunal has jurisdiction over four clusters of crimes: grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. *See* ICTY Statute arts. 2-5. Significantly, as previously noted, the ICTY criminalizes crimes against human-

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*Corp. v. Twombly*, 127 S. Ct. 1955 (2007). The standard seems particularly appropriate to the class actions in this case, which are intended to coerce a settlement rather than provide the framework for a trial which we all know will never take place.

ity only "when committed in armed conflict." While this connection with armed conflict is consistent with the London Charter and the Judgement of the Nuremberg Tribunal, *ante* at 135, the ICTY Statute undermines "subsequent developments de-coupling 'crimes against humanity' from the initiation and waging of an aggressive war . . . ." *Bassiouni, supra*, at 194. Indeed, if we applied this retrograde statute here, it would require the dismissal of the complaints.

Against this backdrop and my earlier discussion of the ICTY statute, I turn to the specific ICTY decisions relied upon by Judge Katzmann. The gruesome facts in the *Furundzija* case, the principal case which Judge Katzmann cites, are illustrative of the circumstances under which the ICTY chose to address aiding-and-abetting liability. There, two victims, identified as A and D, were apprehended and were brutally interrogated. The ICTY made the following finding with respect to the defendant and his co-defendant, who it identified as Accused B: "There is no doubt that the accused and Accused B, as commanders, divided the process of interrogation by performing different functions. The role of the accused was to question, while Accused B's role was to assault and threaten in order to elicit the required information from Witness A and Witness D." *Prosecutor v. Furundzija*, 38 I.L.M. 317, 363, Case No. IT-95-17/1-T, Judgment ¶ 130 (Trial Chamber Dec. 10, 1998). While this was an open-and-shut case of joint participation in a violation of international law by members of an armed group in an international conflict, the ICTY panel entered into a confused and rambling discussion of aiding-and-abetting.

This theme animates the other ICTY cases cited by Judge Katzmann. In *Tadić*, the Trial Chamber found that the defendant, as part of a group proclaiming the creation of an independent Bosnian Serb republic, played an active role in the attack on a majority Muslim town in a predominantly Serb region by, *inter alia*, beating civilians and forcibly transferring them to concentration camps. *E.g.*, *id.*, Judgement ¶¶ 397, 455, 461. He was also among a group of men who beat, stabbed, and/or killed a number of individuals at such concentration camps in the context of the armed conflict. *E.g.*, *id.* ¶¶ 235-36, 261, 303, 316, 435, 448. Again, this is a classic case of joint participation in criminal conduct by state actors in an armed conflict who provided direct and substantial assistance to the "common purpose" of effecting a violation of an international law norm. *Id.* ¶¶ 730, 735, 738. Indeed, *Tadić* was expressly cited in *Furundzija*, as holding that "the accused 'intentionally assisted directly and substantially in the common purpose of the group' to commit the offence." Id. Judgment 226 (internal citations omitted). *See also Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgment ¶ 134 (App. Chamber Feb. 25, 2004) (The evidence showed that "Appellant knew that the seven Muslim men were to be killed; that he walked armed with the group from the place where they had parked the cars to the Drina River; that he pointed his gun at the seven Muslim men; and that he stood behind the Muslim men with his gun together with the other three offenders shortly before the shooting started.").

Similarly, in *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Judgment (Trial Chamber Nov. 2, 2001), the defendants were employees of a camp created by Serb Forces in Bosnia Herzegovina, where non-Serbs

were detained, killed, and otherwise gravely mistreated. The administrative aide to the commander of the camp was found to have participated in the joint criminal enterprise because his "administrative duties constituted one of many integral cogs in the wheel of a system of gross mistreatment." *Id.* Judgment ¶ 460. The other two defendants held individually responsible were both guard shift leaders at the camp. One defendant was convicted on the basis of "substantial evidence presented that the guards on [his] shift beat detainees, sometimes in his presence, and he not only failed to object, but participated on occasion." *Id.* ¶ 497. The other guard leader also permitted serious crimes to be committed by those under his command and he personally "perpetrated a number of serious crimes, particularly sexual violence." *Id.* ¶ 566. This case is the mirror image of the Dachau Concentration Camp case in which

> there was in the camp a general system of cruelties and murders of the inmates (most of whom were allied nationals) and that this system was practiced with knowledge of the accused, who were members of the staff, and with their active participation. Such a course of conduct, then, was held by the court in this case to constitute "acting in pursuance of a common design to violate the laws and usages of war." Everybody who took any part in such common design was held guilty of a war crime, though the nature and extent of the participation may vary.

*Trial of Martin Gottfried Weiss and thirty-nine others*, 11 *Law Reports of Trials of War Criminals* 5, 14 (William S. Hein & Co., Inc. 1997) (1945).[16]

These cases hardly provide a foundation upon which a norm of international law, of the kind Judge Katzmann suggests, can be constructed. Nor do the opinions of the ICTR, to which I now turn.

**(b) The ICTR**

The ICTR was created on November 8, 1994, by the United Nations Security Council Resolution 995 in order to judge those individuals responsible for serious violations of international law in Rwanda and nearby states, between January 1 and December 31, 1994. Specifically, the defendants there were accused of genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. The ICTR Statute did not require a connection between a crime against humanity and an armed conflict. While the ICTR and ICTY are separate tribunals they shared the same Appeals Chamber, Op. of Judge Katzmann *ante* at 40 n.28. Not surprisingly, as Judge Katzmann observes, there was little to distinguish judgments of one from the other. *Id.* These judgments, as I proceed to show, are equally useless precedent on the issue of liability of private parties for violations of customary international law.

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[16] The citation is to the United Nations War Crimes Commission summary of the case based on the indictment, the evidence and arguments of counsel. *See Foreword* 1 *Law Reports of Trials of War Criminals*, at x. The General Military Government Court of the United States Zone itself reached a guilty verdict without any opinion.

In *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement (Trial Chamber Sept. 2, 1998), the defendant, serving as the local "bourgmestre," was charged with executing the laws adopted by the communal legislature, had control over the appointment and removal of communal employees, and had ultimate authority over the communal police and any gendarmes put at the communes disposal. Judgement ¶¶ 61-71. Bourgmestres also had significant *de facto* powers over their constituents, like those of a tribal chief. Id. ¶¶ 72-74. Indeed, the indictment only charges Akayesu with violations performed during his time as a public official. Given the widespread use of public employees and facilities in this conduct, it is clear that Akayesu was a state actor and a joint participant with other state actors.

Similarly, in *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T (Trial Chamber June 7, 2001), and *Prosecutor v. Musema*, Case No. ICTR-96-13-T (Trial Chamber Jan. 27, 2000), the defendants were not only charged with acts of direct criminal participation in crimes in which they were joint participants, they were significant public officials. Bagilishema, the Mayor of a Rwandan commune, was accused of, *inter alia*, arming individuals and directing them to attack, personally attacking and killing persons, as well as other official acts encouraging mass killings. *See Bagilishema*, Judgment annex A. Musema was the director of a state-owned tea factory, under the authority of the Rwandan Ministry of Agriculture, who led and participated in attacks on non-Hutus using factory employees and equipment, personally shot at refugees, ordered the rape of one Tutsi woman, and personally raped another woman. *See Musema*, Judgment § 5.

Finally, in *Prosecutor v. Ntakirutimana*, Case No. ICTR 96-10-A, ICTR-96-17 (App. Chamber Dec. 13, 2004), the Appeals Chamber summarized the Trial Chamber's findings of facts, in part, as follows:

> The Trial Chamber found 1) in relation to the Mugonero Indictment that, in addition to killing Charles Ukobizaba and shooting at Tutsi refugees at the Complex, Gérard Ntakirutimana' s participation in the attacks included procuring ammunition and gendarmes for the attack on the Complex and participation in the attack on Witness SS; and 2) in relation to the Bisesero Indictment that, in addition to killing Esdras and the wife of Nzamwita, pursing and shooting at the refugees, he transported attackers at Kidashya, headed a group of armed attackers at Muyira Hill in June 1994, was at Mutiti Hill in June 1994 with *Interahamwe* where they shot at refugees in a forest by a church, and participated in attacks in Bisesero during the period April to June 1994.

*Id.* ¶ 491. This is a classic example of joint participation of persons acting pursuant to a common design. Moreover, the defendants were also direct participants in the offenses for which they were convicted.

Judge Katzmann concedes that the defendants in the ICTY and ICTR cases he cites involved joint participants in violations of international law. Indeed, virtually all of the defendants in these cases were state actors. They hold, at most, that "substantial as-

sistance with knowledge" satisfies the participation necessary for the imposition of liability on joint participants sharing the common purpose of violating a norm of customary international law. This is entirely consistent with the Rome Statute:

Moreover, to the extent that any language in these opinions suggest more than that, it rises only to the level of *dicta*, of which peremptory norms of international law are not made. Indeed, the leading treatise Judge Katzmann cites explains that "decisions of international tribunals ... exercise considerable influence as an impartial and considered statement of the law by jurists of authority *in light of actual problems which arise before them*." 1 *Oppenheim's International Law: Peace* 31 (Robert Y. Jennings & Arthur Watts eds. 9th ed. 1962) (emphasis added). *Dicta* unrelated to the actual problems which arise before them do not warrant such deference. This is all the more so where *dicta* are inserted by judges who are using their positions to make law with respect to matters with which they have preconceived views. Yet, a leading jurist and commentator has observed that the practice of "deal[ing] through *obiter dicta* with legal issues that were incidental, as it were, to the main questions," was a regular practice of ICTY panels. Antonio Cassese, *The ICTY: A Living and Vital Reality*, 2 J. Int'l Crim. Just. 585, 589 (2004). The excuse given for this practice is that it provided "clarification [that] might have some value for the future development of international criminal law[.]" *Id.* As Antonio Cassese, the President of the ICTY and Presiding Judge of the ICTY Trial Chamber, who was one of the judges on the ICTY panel in *Furundzija*, goes on to explain:

> In this connection, one may find much merit in the witty remark reportedly made by a senior member of the ICTY Office of the Prosecutor in 1995, after the Appeals Chamber handed down its lengthy judgment in [*Prosecutor v. Tadić*, Case No. IT-94-1 (App. Chambers Oct. 2, 1995) (Cassese, Presiding J.)]: 'We had gone for a steak,' he said, 'and have got a whole cow.' However, international courts operate in a legal system that is notably lacking in many respects. Among other things, the absence of an international law-maker and an international court with compulsory universal jurisdiction entails that many rules are not clear, particularly when they are of customary origin, and are thus open to differing interpretations-hence the need for courts gradually to spell out the contents of those rules, if need be through *obiter dicta*.

*Id.* at 590.

Nevertheless, Judge Cassese cautioned that "one should not be oblivious of the possible flaws or abuses. Courts may indulge in legal discussions that not only are peripheral to the ratio decidendi, but may also prove simply academic and sometimes also misleading for future courts pronouncing on the same matters." *Id.* This accurately describes the aiding-and-abetting *dicta* in the ICTY opinions. Indeed, even Judge Katzmann acknowledges they have generated some confusion. Op. of Judge Katzmann *ante*

at 40 n.15. The *dicta* do not constitute a foundation strong enough to provide a future basis for rejecting the international consensus achieved by the Rome Statute on the elements of aiding-and-abetting.

**Conclusion**

I dissent from judgment reversing the dismissal of the complaint for the reasons I have elaborated above. Nevertheless, I concur in section II.A of Judge Katzmann's opinion that rejects Judge Hall's argument that the scope of liability for the violation of the norm of international law must be decided by reference to our own domestic law. I concur as well in section II.B of Judge Katzmann' s opinion that articulates the elements of aiding-and-abetting liability as defined in article 25(b) & (c) of the Rome Statute. These elements are consistent with, if not mandated by, customary international law. I also concur in section II of the *per curiam* opinion dismissing the TVPA cause of action for the reasons stated in the *per curium* opinion and for the additional reason that only natural persons are subject to liability under it.

## APPENDIX B

In re: SOUTH AFRICAN APARTHEID LITIGATION.
Lungisile Ntsebeza, et al., Plaintiffs,
v.
Citigroup, Inc., et al., Defendants.
Hermina Digwamaje, et al., Plaintiffs,
v.
IBM Corporation, et al., Defendants.
Frank Brown, et al., Plaintiffs,
v.
Amdahl Corp., et al., Defendants.
Lungisile Ntsebeza, et al., Plaintiffs,
v.
Oerlikon Contraves AG,
et al., Defendants.
Lungisile Ntsebeza, et al., Plaintiffs,
v.
Holcim Ltd., et al., Defendants.
Lungisile NTSEBEZA, et al., Plaintiffs,
v.
Schindler AG, et al., Defendants.
Lungisile Ntsebeza, et al., Plaintiffs,
v.
EMS AG, et al., Defendants.
Lungisile Ntsebeza, et al., Plaintiffs,
v.
Exxon Mobil Corporation,
et al., Defendants.
Lungisile Ntsebeza, et al., Plaintiffs,
v.
American Isuzu Motors Inc.,
et al., Defendants.
Khulumani, et al., Plaintiffs,
v.

Barclays National Bank Ltd.,
et al., Defendants.

MDL No. 1499(JES), 02 Civ. 4712(JES),
02 Civ. 6218(JES), 02 Civ. 10062(JES),
03 Civ. 1023(JES), 03 Civ. 1024(JES), 03 Civ.
1025(JES), 03 Civ. 1026(JES), 03 Civ. 4524(JES).

United States District Court,
S.D. New York.

Nov. 29, 2004.

## MEMORANDUM OPINION AND ORDER

SPRIZZO, District Judge.

THIS DOCUMENT RELATES TO:

Three groups of plaintiffs led by Lungisile Ntsebeza ("Ntsebeza plaintiffs"),[1] Hermina Digwamaje ("Digwamaje plaintiffs"), and the Khulumani Support Group ("Khulumani plaintiffs") (collectively "plaintiffs"), respectively, filed the above actions in eight federal district courts against a slew of multinational corporations that did business in apartheid South Africa. The actions, which were transferred to this Court by the Judicial Panel on Multidistrict Litigation, allege, among other things, that defendants violated international law and thus are subject to suit in United States federal district court under the Alien Tort Claims Act, 28 U.S.C. § 1350

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[1] This group includes the action in *Brown v. Amdahl Corp.*, 02 Civ. 10062(JES), since the complaint and prayer for relief are the same as that in the *Ntsebeza* actions.

("ATCA"), and other jurisdictional provisions.[2] Defendants,[3] UBS AG, Citigroup, Inc., Minnesota Mining and Manufacturing Co., General Electric Co., Bristol–Myers Squibb Co., Commerzbank AG, Dresdner Bank AG, E.I. DuPont de Nemours, Shell Oil Co., Xerox Corp., IBM Corp., General Motors, Honeywell International, Inc., ExxonMobil Corp., Deutsche Bank AG, Colgate–Palmolive Co., National Westminster Bank Plc, Bank of America, N.A., Dow Chemical Co., Ford Motor Co., Barclays Bank Plc, Coca–Cola Co., J.P. Morgan Chase & Co., Credit Agricole Indosuez, Hewlett–Packard Co., Daimler-Chrysler Corp., EMS–Chemie (North America) Inc., ChevronTexaco Corp., ChevronTexaco Global Energy, American Isuzu Motors, Inc., Nestlé USA, Inc., Holcim (US) Inc., Fujitsu Limited, Credit Suisse Group, and BP Plc ("defendants"), bring this motion to dismiss the complaints, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.[4]

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[2] Plaintiffs also rely on 28 U.S.C.§§ 1331 and 1332, which provide for federal question and diversity jurisdiction, respectively.

[3] Pursuant to this Court's Order dated May 21, 2003, this Motion is limited to those defendants as to whom the Court's personal jurisdiction is not contested. In addition, not all defendants party to this motion are defendants in each of the above-captioned actions.

[4] Defendants also argue that there is no case or controversy for this Court to hear under Article III of the Constitution because plaintiffs cannot establish that they have standing to bring this action and because the matter is a non-justiciable political question. *See* Memorandum of Law in Support of Defendants' Joint Motion to Dismiss at 3–4. Given the Court's finding that defendants are entitled to relief on other grounds, the Court need not address these remaining grounds for defendants' motion.

Because the Court finds that the various Complaints do not sufficiently allege that defendants violated international law, this Court lacks subject matter jurisdiction under the ATCA and therefore defendants' motion is granted and plaintiffs' complaints are dismissed.[5]

## BACKGROUND

According to the allegations set forth in the various complaints,[6] the 1948 South African elections witnessed the rise to power of the National Party. Building on laws that restricted the African majority in the country, the National Party erected a system whereby a group of inhabitants who accounted for just fourteen percent of the population completely ruled over the country and controlled all aspects of life. *See* Khulumani Complaint ("K.Compl.") ¶¶ 140–44, 197. That system—apartheid—shockingly and regrettably reigned supreme over an entire country and its people until just over one decade ago.[7]

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[5] Digwamaje plaintiffs also allege violations of the Torture Victim Protection Act, 28 U.S.C. § 1350 note, and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* As discussed *infra,* the Court finds that Digwamaje plaintiffs have failed to state cognizable claims under these provisions.

[6] The allegations that follow are taken from the various Complaints and are presumed to be true for purposes of this Motion. *See Jaghory v. New York State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir.1997).

[7] The specific date of the end of apartheid is a matter of some debate that is largely irrelevant here. Plaintiffs argue that the election of Nelson Mandela as President in 1994 signaled the end of apartheid, *see* Digwamaje Second Amended Class Action Complaint ¶ 69, while defendants point to the lifting of economic sanctions by the United States in 1991, Exec. Order No. 12,769, 56 Fed.Reg. 31,855 (July 10, 1991), as apartheid's final

The history of apartheid is one marked by hatred, racism, and inhuman treatment. Fueled by the desire to exact the greatest possible benefit from an African majority that had no official purpose except to "work for [whites]," Digwamaje Second Amended Class Action Complaint ("D.Compl.") ¶ 85, the apartheid regime engaged in practices that were deemed by some as "repugnant to the moral and political values of democratic and free societies," Exec. Order No. 12,532, 50 Fed.Reg. 36,861 (Sept. 9, 1985), and by others as nothing short of "a crime against humanity," International Convention on the Suppression and Punishment of the Crime of Apartheid, November 30, 1973, art. I, 1015 U.N.T.S. 243, 245.

The regime retained a stranglehold on power by enacting a number of laws that all but assured that Africans would remain in a state of near-enslavement. The Bantu Authorities Act of 1951 and amendments thereto relegated Africans to certain lands called "bantustans" and restricted their access to all outside urban areas. *See* K. Compl. ¶¶ 152–57; D. Compl. ¶¶ 71–72. In order to simply gain access to these urban areas Africans were required to carry pass books, which contained information as to each person's identity, ethnic group, and employer. *See* D. Compl. ¶ 79. Once employment was terminated it would be noted on the pass book and the individual would be sent back to life on the bantustan. *See id.* ¶ 79; K. Compl. ¶¶ 156–57.

Life on the bantustan was far from desirable and it represented a sharp contrast with the lifestyles of the white minority. Most inhabitants fell below the poverty line. *See* K. Compl. ¶¶ 186–87. Disease and

breath, see Memorandum of Law in Support of Defendants' Joint Motion to Dismiss at 59–60.

malnourishment were prevalent, while economic opportunities, suitable housing, and basic amenities were non-existent. *See id.* ¶¶ 188–90, 193–96. To the apartheid regime the bantustan represented nothing more than a "reserve army of unemployed" whose sole purpose was to wait for its call to duty "for the sake of the white economy." D. Compl. ¶¶ 81, 84. The white minority benefitted greatly from this exploitation, earning on average four times as much income and suffering far less from diseases and lack of resources. *See* K. Compl. ¶¶ 189, 192, 196–97.

The Complaints further allege that in addition to relegating Africans to substandard living conditions, the apartheid regime maintained a brutal and vicious policy of repression. Through the South African Police and the South African Defense Force, the apartheid regime cracked down on African demonstrations and resistance movements. In 1960, at a Sharpeville demonstration, police fired into a crowd killing sixty-nine people and wounding almost two hundred others. *See id.* ¶ 203; D. Compl. ¶ 103. Anti-apartheid leaders were summarily killed or imprisoned. *See* Ntsebeza Second Consolidated and Amended Complaint ("N.Compl.")[8] ¶¶ 165, 173; D. Compl. ¶¶ 104, 107, 111. The regime even resorted to

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[8] A Third Consolidated and Amended Complaint, dated May 16, 2003, was delivered to Chambers pursuant to this Court's order, allowing amendment, dated April 28, 2003. That Complaint was never properly filed by Ntsebeza plaintiffs. This Court therefore will cite to the virtually identical Second Consolidated and Amended Complaint. This Complaint, which was filed in the action docketed as 02 Civ. 4712(JES), is substantially the same as the Complaints filed in the other *Ntsebeza* and *Brown* actions and thus all references will be to this Complaint.

"massive violence against and killings of ... schoolchildren and students," S.C. Res. 418, U.N. SCOR, 32d Sess., U.N. Doc. S/INF/33 (1977), including the killings of unarmed students in Soweto in 1976.[9] *See* K. Compl. ¶ 206; D. Compl. ¶ 110. Arbitrary arrests, sexual and physical abuse, and torture were commonplace. *See* K. Compl. ¶¶ 14–108, 207, 212, 216–19; D. Compl. ¶¶ 5–26; N. Compl. ¶¶ 34–41.

Defendants did business in South Africa during this period. At the least, defendants benefitted from a system that provided a glut of cheap labor. *See, e.g.*, K. Compl. ¶¶ 273–76; N. Compl. ¶¶ 105, 108, 124; D. Compl. ¶¶ 147–52. Frequently, however, defendants supplied resources, such as technology, money, and oil, to the South African government or to entities controlled by the government. *See, e.g.*, K. Compl. ¶¶ 302, 319, 400–01, 431, 501, 588. Not surprisingly, many of those resources were used by the apartheid regime to further its policies of oppression and persecution of the African majority. For example, the South African police shot demonstrators "from cars driven by Daimler–Benz engines," K. Compl. ¶ 531, the regime tracked the whereabouts of African individuals on IBM computers, *see* K. Compl. ¶¶ 587–602; D. Compl. ¶¶ 189–215, the military kept its machines in working order with oil supplied by Shell, *see* K. Compl. ¶¶ 319–22, and the government received needed capital and favorable terms of repayment of loans from defendant banks, *see* K.

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[9] A chilling excerpt of comments made during a Cabinet meeting at the time of the Soweto incident indicates that the Minister of Police proposed "that this movement must be broken and thinks that police should perhaps act a bit more drastically and heavy-handedly which will entail more deaths. Approved." K. Compl. ¶ 206.

Compl. ¶¶ 393–425; Brief of Swiss Campaign for Debt Cancellation as *Amici Curiae* in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss at 2–10.

Defendants had contacts with the apartheid government in other ways as well. Defendants whose sites of operations were deemed key points under the National Key Points Act of 1980 were required to provide high levels of security so as to protect against civil unrest and African uprisings. *See* K. Compl. ¶¶ 278–81, 549–54. The owners of the sites were required to provide storage facilities for arms and to cooperate with the South African Defense Force to provide local defense of the area. *See* D. Compl. ¶ 361; Brief of KOSA as *Amici Curiae* in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss at 4 (describing an oil refinery key point as having "several lines of defence" including "an electrified iron curtain," "heavily armed watchtowers," and "military patrols armed to the teeth").

While defendants were benefitting from apartheid policies which provided them with cheap labor, cheap power, and high levels of government services to white areas, *see* 6 Report of the Reparation and Rehabilitation Committee at 140–41; N. Compl. ¶¶ 19–22, the United Nations was actively engaged in passing resolutions which urged the South African government to dismantle its policy of apartheid, *see* K. Compl. ¶¶ 224–67; N. Compl. ¶¶ 144–47, 152–53. The General Assembly deemed apartheid "a crime against humanity," G.A. Res. 3068, U.N. GAOR, 28th Sess., Supp. No. 21, at 75, U.N. Doc. A/9030 (1974), and the Security Council declared that "all States shall cease forthwith any provision to South Africa of arms and related *matérial* of all types," S.C. Res.

418, U.N. SCOR, 32d Sess., U.N. Doc. S/INF/33 (1977). Following these international rebukes of apartheid, many defendants publicly withdrew from South Africa while maintaining profitable entities within the nation that continued to provide goods and services that assisted the regime. *See* K. Compl. ¶¶ 284–87, 315–16, 558–61, 600– 02.

Ntsebeza plaintiffs filed these actions in seven district courts between June 19, 2002 and December 6, 2002 on behalf of the class of individuals who lived in South Africa at any time between 1948 and the present and who suffered damages as a result of the crimes of apartheid. *See* N. Compl. ¶¶ 26, 196 (estimating that the class encompasses millions of individuals). Ntsebeza plaintiffs seek equitable relief that includes production of defendants' documents, creation of an international historical commission, and creation of affirmative action and educational programs. *See id.* ¶ 30.a. They also seek injunctive relief which would prevent the defendants from destroying documents that relate to their investment in apartheid South Africa. *See id.* ¶ 30.a. Finally, they seek monetary relief that includes restitution and disgorgement of all monies that can be linked to aiding, conspiring with, or benefitting from apartheid South Africa. *See id.* ¶ 30.b.

Digwamaje plaintiffs filed this action in this District on August 2, 2002. The action was brought on behalf of all persons who lived in South Africa between 1948 and the present and who suffered damages as a result of apartheid. *See* D. Compl. ¶ 427. Digwamaje plaintiffs seek equitable, injunctive, and monetary relief, *see id.* ¶ 431, and pray for compensatory and punitive damages in excess of $400,000,000,000, *see id.* at 142.

Khulumani plaintiffs filed this action in the Eastern District of New York on November 12, 2002. The action was brought on behalf of the Khulumani Support Group and its 32,700 members, as well as individual plaintiffs who suffered from the crimes of the apartheid regime. *See* K. Compl. ¶¶ 12–108, 685. Khulumani plaintiffs seek relief in the form of disclosure of defendants' documents related to their activities in South Africa, and compensatory and punitive damages. *See id.* at 169.

## DISCUSSION

On a motion to dismiss, the Court must accept all facts alleged in the Complaint as true and must draw all reasonable inferences in favor of the plaintiff. *See Jaghory v. New York State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir.1997). Dismissal is only appropriate at this stage of the proceedings if it appears beyond doubt that the plaintiff can prove no set of facts which would entitle it to relief. *See Sec. Investor Prot. Corp. v. BDO Seidman, LLP*, 222 F.3d 63, 68 (2d Cir.2000). Although courts on motions to dismiss are generally limited to examining the sufficiency of the pleadings, where, as here, a challenge is directed at the Court's subject matter jurisdiction, the Court may turn to materials outside the Complaint to resolve jurisdictional issues. *See Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 161 n. 30 (2d Cir.2003); *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir.1998).

### A. Plaintiffs' Claims Under the ATCA

The ATCA provides, in full, that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Although the provision

dates back to the eighteenth century, its lack of use led some courts to speculate that "no one seems to know whence it came." *IIT v. Vencap*, 519 F.2d 1001, 1015 (2d Cir.1975). This Circuit began the modern line of ATCA cases when, in *Filartiga v. Pena–Irala*, 630 F.2d 876 (2d Cir.1980), it decided that in determining jurisdiction under the ATCA the "law of nations" must be understood as an evolving standard that will encompass more than it did at the time of the statute's enactment. *See id.* at 881. Thus, the Court concluded that acts of torture committed by state officials violate the law of nations and thus support jurisdiction under the ATCA. *See id.* at 884. Since then courts in this Circuit have ruled that genocide committed by private actors is actionable under the ATCA, *Kadic v. Karadzic*, 70 F.3d 232, 241–42 (2d Cir.1995), and that jurisdiction is proper over private actors who aid in the commission of human rights violations, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289, 321–24 (S.D.N.Y.2003).

The Supreme Court recently ruled on the scope of the *ATCA* in *Sosa v. Alvarez–Machain*, —— U.S. ——, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004). In *Sosa*, the Supreme Court held that the ATCA was designed to afford the federal courts jurisdiction over well-accepted and clearly-defined offenses under international law such as piracy and offenses involving ambassadors. *See id.* at 2754–56. The statute was essential at the time of its enactment in 1789 because there was at that time no statute authorizing federal court jurisdiction over such matters. *See id.* at 2756–59. Thereafter, Congress specifically enacted federal question jurisdiction and has from time to time enacted other legislation creating federal jurisdiction over specific classes of offenses. *See, e.g.*, 28

U.S.C. § 1351 (giving jurisdiction to federal courts for all civil actions against consuls of foreign nations); *id.* § 1363 (bestowing original jurisdiction on the federal district courts over civil actions "brought for the protection of jurors' employment" under § 1875).

It is against the background of this holding and in that historical context that the issues raised by the present motions must be addressed.

While it would have been unquestionably preferable for the lower federal courts if the Supreme Court had created a bright-line rule that limited the ATCA to those violations of international law clearly recognized at the time of its enactment, the Supreme Court left the door at least slightly ajar for the federal courts to apply that statute to a narrow and limited class of international law violations beyond those well-recognized at that time. *See Sosa*, 124 S.Ct. at 2761, 2764.

That approach, as Justice Scalia noted in his concurring opinion, of course again relegated to the lower federal courts the task of grappling with and determining what offenses against international law fit within that narrow class of offenses.[10] The consequences of leaving that door open, as Justice Scalia stated, were not only to make the task of the lower federal courts immeasurably more difficult, but also to invite the kind of judicial creativity that has caused the disparity of results and differences of

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[10] Justice Scalia disagreed with the reasoning of the majority. He remarked that the majority approach of creating federal common law out of international norms and then creating brand new causes of action out of the purely jurisdictional ATCA was "nonsense upon stilts." *Sosa*, 124 S.Ct. at 2772 (Scalia, J., concurring).

opinion that preceded the decision in *Sosa*. *See id.* at 2775 (Scalia, J., concurring) (pointing to this Circuit's holding in *Kadic*, which found a private right of action under the Convention on the Prevention and Punishment of the Crime of Genocide even though Congress explicitly indicated that the treaty was not to be understood as granting one).

However, even though the *Sosa* decision did not deliver the definitive guidance in this area that some had come to expect, nevertheless it does dispose of the issues raised by these motions.

In *Sosa*, the Supreme Court set forth the following considerations for courts to consider in determining whether conduct should be found to be encompassed by the ATCA. First, the Court set as a prerequisite that any new claim under the ATCA must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 2761–62. Second, courts must be mindful of the changed understanding of common law since the enactment of the ATCA in 1789, and, consistent with the Court's teaching in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), should be averse to innovate without legislative guidance, especially when making the decision to "exercis[e] a jurisdiction that remained largely in shadow for much of the prior two centuries." *Sosa*, 124 S.Ct. at 2762. Third, courts should be wary of creating private rights of action from international norms because of the collateral consequences such a decision would have. *Id.* at 2762–63. Fourth, courts must consider the foreign relations consequences of finding that conduct is encompassed by the ATCA, since entertaining such

suits can impinge on the discretion of the legislative and executive branches of this country as well as those of other nations. *Id.* at 2763, 2766 n. 21. Finally, courts must be mindful of the absence of a "congressional mandate to seek out and define new and debatable violations of the law of nations." *Id.* at 2763.

Tested by these precepts, it is clear that plaintiffs' causes of action under the ATCA must be dismissed.

Plaintiffs have alleged a veritable cornucopia of international law violations, including forced labor, genocide, torture, sexual assault, unlawful detention, extrajudicial killings, war crimes, and racial discrimination. K. Compl. ¶ 682; D. Compl. ¶ 2; N. Compl. ¶ 213. Plaintiffs link defendants to these alleged international law violations in three ways. Plaintiffs contend that defendants engaged in state action by acting under color of law in perpetrating these international law violations,[11] D. Compl. ¶¶ 1, 256, 283, that defendants aided and abetted the apartheid regime in the commission of these violations, N. Compl. ¶¶ 218–27; D. Compl. ¶¶ 517–22; K. Compl. ¶ 682, and that defendants' business activities alone are sufficient to make out an international law violation, N. Compl. ¶ 230.

Although it is clear that the actions of the apartheid regime were repugnant, and that the decisions of the defendants to do business with that regime may have been morally suspect or "embarrassing," K. Compl. ¶ 449, it is this Court's job to apply the law and not some normative or moral ideal. *Cf.*

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[11] Khulumani plaintiffs do not make this contention. *See* Khulumani Plaintiffs' Response to Defendants' Joint Motion to Dismiss at 2.

*Planned Parenthood v. Casey*, 505 U.S. 833, 850, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (joint opinion) ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."). Given the Court's ruling in *Sosa*, as well as the Second Circuit's decision in *Flores*, it is clear that none of the theories pleaded by plaintiffs support jurisdiction under the ATCA.

1. State Action

First, it is plain from relevant Second Circuit authority that plaintiffs have not pleaded facts that would allow this Court to find that defendants engaged in state action by acting under color of law in perpetrating the complained-of acts. In *Bigio v. Coca–Cola Co.*, 239 F.3d 440 (2d Cir.2001), the Court explained that state action under the ATCA, which is derived from the color of law requirement of 42 U.S.C. § 1983, required that a private individual " 'act[ ] together with state officials or with significant state aid.' " *Bigio*, 239 F.3d at 448 (quoting *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir.1995)).

The *Bigio* Court found that Coca–Cola did not act under color of law when it purchased property that it knew the Egyptian government had seized from Jewish landowners. *Bigio*, 239 F.3d at 448–49. The Court concluded that "[a]n indirect economic benefit from unlawful state action is not sufficient" to establish state action. *Id.* at 449.

Here, plaintiffs do not allege actions by the defendants that elevate them to the status of state actors in the commission of torture, genocide, killings, and other serious crimes. At most, by engaging in

business with the South African regime, defendants benefitted from the unlawful state action of the apartheid government.

Plaintiffs make much of Judge Wood's decision in *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 WL 319887 (S.D.N.Y. Feb.28, 2002). In *Wiwa*, plaintiffs alleged that defendants actively cooperated with Nigerian officials in the suppression of a group that was in opposition to the defendants' activities in the region. *Id.* at *13. Defendants made payments to the military, contracted to purchase weapons for the military, coordinated raids on the group, and paid the military to violently respond to opposition. *Id.*

These activities are not present here. At most, plaintiffs allege that defendants followed the National Key Points Act and made the necessary preparations to defend their premises from uprisings. *See* D. Compl. ¶ 361. This activity alone does not constitute joint action with the apartheid regime to commit the slew of international law violations that are complained of. *See Atkinson v. B.C.C. Assocs.*, 829 F.Supp. 637, 646–47 (S.D.N.Y.1993) (indicating that even if the relationship between a private actor and the government would create state action with regard to certain activities, it would not mean that everything done by the private actor would be deemed state action). All other allegations relate to business activities akin to that at issue in *Bigio*. *See* D. Compl. ¶¶ 195, 228, 237, 303–04. Defendants engaged in no behavior which, because of its connection with the apartheid regime, " 'may be fairly treated as that of the State itself.' " *Abdullahi v. Pfizer, Inc.*, No. 01 Civ. 8118, 2002 WL 31082956, at *5 (S.D.N.Y. Sept.17, 2002) (quoting *Blum v. Yaretsky*, 457 U.S.

991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982)). Because this Court does not find state action, it need not consider whether the actions of the apartheid regime violated the law of nations so as to support jurisdiction under the ATCA.

2. Aiding and Abetting and Doing Business in South Africa

Because defendants did not engage in state action, plaintiffs will need to show that either aiding and abetting international law violations or doing business in apartheid South Africa are violations of the law of nations that are "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" such as piracy and crimes against ambassadors. *Sosa*, 124 S.Ct. at 2761–62.

The Second Circuit has described the standard as a violation of "those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." *Flores*, 343 F.3d at 154. The *Flores* Court stressed the requirement that the norm be a legal obligation, and not acceded to merely for moral or political reasons. *Id.* at 154. Also, the norm must be sufficiently definite and not so general as to be simply "aspirational." *Id.*

Plaintiffs here point to little that would lead this Court to conclude that aiding and abetting international law violations is itself an international law violation that is universally accepted as a legal obligation. Plaintiffs point to the International Criminal Tribunals for the former Yugoslavia, ICTY STAT. art. 7(1), and Rwanda, ICTR STAT. art 6(1), respectively, the Nuremberg trials, the International Convention on the Suppression and Punishment of the

Crime of Apartheid ("Apartheid Convention"), November 30, 1973, art. I, 1015 U.N.T.S. 243, 245, and this Court's ruling in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289 (S.D.N.Y.2003). None of these sources establishes a clearly-defined norm for ATCA purposes.

The International Criminal Tribunals and rulings pursuant thereto, besides dealing with criminal and not civil matters, are not binding sources of international law. *See Flores*, 343 F.3d at 169–70. The same applies for the Nuremberg trials. The Apartheid Convention, which similarly dealt with the criminal repercussions for aiding apartheid, was not ratified by a number of major world powers, including the United States, Great Britain, Germany, France, Canada, and Japan. *See* Participants to International Convention on the Suppression and Punishment of the Crime of Apartheid reprinted in Appendix of Declarations and Cited Public Materials to the Memorandum of Law in Support of Defendants' Joint Motion to Dismiss at A357. Without the backing of so many major world powers, the Apartheid Convention is not binding international law. *See Flores*, 343 F.3d at 163 n. 33.

Finally, this Court declines the invitation to follow the lead of *Presbyterian Church* in finding that aider and abettor liability is recognized under the ATCA. This is especially true since the applicability of that concept in a civil context is dubious at best.

In *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994), the Supreme Court, in dealing with the issue of aiding and abetting in the civil context, stated that the concept was "at best uncertain in application." *Id.* at 181, 114 S.Ct. 1439. Therefore, the

Court held that where Congress has not explicitly provided for aider and abettor liability in civil causes of action, it should not be inferred. *Id.* at 181–82, 189–90, 114 S.Ct. 1439. The Court reasoned that in the context of Rule 10b–5 actions, allowing aider and abettor liability would only serve to compound the problems that already existed with the cause of action, including vexatious litigation and strike suits. *Id.* at 189, 114 S.Ct. 1439. The rule in *Central Bank* has been applied to other civil causes of action. *See, e.g., Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 841 (2d Cir.1998) (applying *Central Bank* to conspiracy claims under Rule 10b–5); *Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison*, 955 F.Supp. 248, 255 (S.D.N.Y.1997) (extending *Central Bank* to actions under the Racketeer Influenced and Corrupt Organizations Act).

*Central Bank* applies with special force here. Although the ATCA points to international law for the causes of action over which it grants jurisdiction,[12] the ATCA presently does not provide for aider and abettor liability, and this Court will not write it into the statute. In refusing to do so, this Court finds this approach to be heedful of the admonition in *Sosa* that Congress should be deferred to with respect to innovative interpretations of that statute.

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[12] It is this argument which led the Court in *Presbyterian Church* to reject the application of *Central Bank* to the issue at hand. *See Presbyterian Church*, 244 F.Supp.2d at 321. While this Court disagrees with that conclusion, it also notes that *Presbyterian Church* was decided before the Court's ruling in *Sosa*, which made clear that deference to Congress and a restrained understanding of new international norms was required of the lower federal courts in this area.

This conclusion is strengthened by the policies behind *Central Bank* and is in accord with the framework announced by *Sosa*. To allow for expanded liability, without congressional mandate, in an area that is so ripe for non-meritorious and blunderbuss suits would be an abdication of this Court's duty to engage in "vigilant door-keeping." *Sosa*, 124 S.Ct. at 2764; *cf.* Statement of President George Bush Upon Signing H.R.2092, 1992 U.S.C.C.A.N. 91 (Mar. 12, 1992) (expressing concern that cause of action created by Torture Victim Protection Act would overburden the courts with "ill-founded or politically motivated suits, which have nothing to do with the United States and which offer little prospect of successful recovery").

This Court is also mindful of the collateral consequences and possible foreign relations repercussions that would result from allowing courts in this country to hear civil suits for the aiding and abetting of violations of international norms across the globe.[13] To do so would not be consistent with the "restrained conception" of new international law violations that the Supreme Court has mandated for the lower federal courts.[14]

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[13] *See Sosa*, 124 S.Ct. at 2768 (remarking that the implications of allowing arbitrary arrest to support ATCA jurisdiction were breathtaking, and that if plaintiff could not establish that defendant was a state actor then "he would need a rule broader still" in order to get jurisdiction).

[14] Given the Court's ruling, there is no need to reach the question of whether plaintiffs' allegations are sufficient to state a claim for aider and abettor liability. Considering, however, this case's similarity to the venerable ruling in *United States v. Falcone*, 109 F.2d 579 (2d Cir.1940), it seems unlikely that defendants would be liable as aiders and abettors here.

The final possible basis upon which to ground ATCA jurisdiction here is the theory that defendants violated the law of nations by doing business in apartheid South Africa. Although plaintiffs repeatedly indicated that "[t]his lawsuit is not about whether a company can do business with a repressive regime," Khulumani Plaintiffs' Response to Defendants' Joint Motion to Dismiss at 1; *see also* Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss at 17; Transcript of Oral Argument, dated November 6, 2003, at 96, plaintiffs' complaints are almost solely composed of allegations of defendants' business activities within South Africa and the consequences that flowed therefrom.

Plaintiffs have pointed to a multitude of sources that they claim establishes that doing business with the apartheid regime was a violation of the law of nations.[15] Plaintiffs rely on several treaties—the U.N. Charter, June 26, 1945, 16 U.S.T. 1134, the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), Dec. 9, 1948, S. Exec. Doc. O, 81–1, 78 U.N.T.S. 277, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"), Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85, the International

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[15] As stated above, although plaintiffs wholeheartedly contend that they are not seeking to rest jurisdiction on the basis of "doing business" in South Africa, the vast majority of plaintiffs' allegations consist of defendants' business activities coupled with the legal conclusion that this constituted aiding and abetting. Since this Court has found that aiding and abetting liability will not serve as a basis for ATCA jurisdiction, it will consider plaintiffs' claims under the rubric of doing business in South Africa.

Covenant on Civil and Political Rights ("ICCPR"), Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, and the Apartheid Convention, November 30, 1973, 1015 U.N.T.S. 243—as well as a number of General Assembly and Security Council declarations and resolutions and the Restatement (Third) of Foreign Relations Law. *See* D. Compl. ¶ 465; K. Compl. ¶¶ 638–39, 648.

Although treaties that set forth definite rules and enjoy overwhelming acceptance and adherence are valid sources of international norms for ATCA purposes, *see Flores*, 343 F.3d at 157–59, the treaties relied on by plaintiffs suffer from a number of defects that preclude findings that any of them provide applicable customary international law.

Although the Genocide Convention and the Convention Against Torture, which prohibit "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group," Genocide Convention, art. 2, 78 U.N.T.S. at 280, and "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ...for any reason based on discrimination of any kind," Convention Against Torture, art. 1, 1465 U.N.T.S. at 113–14, respectively, may apply to the acts undertaken by the apartheid regime itself, they nonetheless do not describe the actions undertaken by defendants here. While both punish complicity in engaging in such acts, both conventions are criminal in nature, and neither is self-executing. *See* Genocide Convention, art. 5, 78 U.N.T.S. at 280; Convention Against Torture, S. Treaty Doc. No. 100–20 (declaring that United States deems articles one through sixteen not to be self-executing). Therefore, there is no private liability under the treaties in United

States courts. *See Flores*, 343 F.3d at 163. It follows that no liability based upon any alleged violation of these norms can form an adequate predicate for jurisdiction under the ATCA.

The ICCPR, which the United States also deemed not to be self-executing, *see Sosa*, 124 S.Ct. at 2767, deals primarily with ensuring that state actors do not violate the rights of their citizens. For example, the ICCPR proclaims that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant," ICCPR, art. 2, 999 U.N.T.S. at 173, which include the right not to be enslaved, art. 8, *id.* at 175, the right to be free from arbitrary detention, art. 9, *id.*, and the right to be equal before the law, art. 26, *id.* at 179. Again, although these provisions may apply to the apartheid regime, they do not apply to the actions of defendants.[16]

The other authorities relied on by plaintiffs simply do not create binding international law. As stated earlier, the Apartheid Convention, not having been adopted by most world powers, did not create binding international law actionable under the ATCA. The UN Charter, General Assembly resolutions, and the Declaration of Human Rights ("Declaration"), G.A.

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[16] Reliance on the Restatement (Third) of Foreign Relations Law section 702 is misplaced for the same reason. The apartheid regime, and not defendants, engaged in the behavior that is the subject of that section. In addition, the Restatement will only be relied upon "not for the speculations of [its] authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900).

Res. 217A (III), U.N. Doc. A/810 (1948), are also insufficient for that purpose.

The UN Charter and the Declaration speak in broad aspirational language that does not meet the specificity required under the ATCA.[17] For example, the Declaration advances a number of the ideals later set forth in the treaties that plaintiffs rely upon, *see* arts. 4, 5, 7, 9 (prohibiting slavery, torture, discrimination, and arbitrary arrest), as well as the goal of "equal pay for equal work," *see* art. 23. The Declaration, however, creates no legal obligations, *see Sosa*, 124 S.Ct. at 2767, and the language cited above, which could arguably be applied to defendants here, *see* N. Compl. ¶¶ 228–56, is simply not specific enough to create binding legal rules, *see Flores*, 343 F.3d at 160–61 (finding that rights to health and life are too indefinite and express "virtuous goals" only).

General Assembly resolutions are similarly not valid sources of international law. *See Flores*, 343 F.3d at 165. Although the UN repeatedly condemned apartheid, *see, e.g.*, G.A. Res. 3068, U.N. GAOR, 28th Sess., Supp. No. 21, at 75, U.N. Doc. A/9030 (1974), it

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[17] There are a number of practical reasons for the prohibition on finding that broad aspirational language states customary international law. Besides the obvious difficulty of enforcing a principle that is so purposefully general in order that the greatest number of countries can agree while still disagreeing on the particulars of how to implement the goal, *see Flores*, 343 F.3d at 161, there is also the great problem that international agreements often set patently unattainable goals that cannot reasonably be considered legal obligations of those countries that hope to one day fulfill those aspirations. *See, e.g.*, Kellogg-Briand Pact of 1928, 46 Stat. 2343 (1928) (renouncing war as an instrument of national policy and proclaiming that disputes will only be resolved by peaceful means).

simply does not have the power to legally bind member states. The only binding sanction passed by the UN was an embargo that prohibited all states from exporting arms to the apartheid regime. S.C. Res. 418, U.N. SCOR, 32d Sess., U.N. Doc. S/INF/33 (1977). Moreover, like the treaties discussed above, this Security Council resolution simply does not apply to defendants.

The only materials that plaintiffs cite that even apply to defendants are a series of General Assembly resolutions that "[c]ondemn[ ] ... transnational corporations and financial institutions that have increased political, economic and military collaboration with the racist minority regime of South Africa." G.A. Res. 38/39, U.N. GAOR, 38th Session (1983); *see also* G.A. Res. 38/50, U.N. GAOR, 38th Session (1983); K. Compl. ¶¶ 258–67. Despite the strong rhetoric, these resolutions simply recommend that nations pass legislation that will cut off the apartheid regime from the rest of the world. They do not impose binding legal obligations.

Even if this Court were swayed by the nonbinding General Assembly resolutions calling for an end to defendants' business activities in South Africa, it is clear from history and from the factors announced by the Court in *Sosa*, and discussed above, that the opinions expressed by these resolutions never matured into customary international law actionable under the ATCA.

Moreover, as *Sosa* points out, this Court must be aware of the collateral consequences that would result from finding a new international law violation that would support ATCA jurisdiction. In this case, those consequences are not only far-reaching but would raise the prospect of serious impediments to

the flow of international commerce. Indeed, the South African government has indicated that it does not support this litigation and that it believes that allowing this action to proceed would preempt the ability of the government to handle domestic matters and would discourage needed investment in the South African economy. *See* Declaration of Minister Penuell Mpapa Maduna, dated July 11, 2003 at ¶¶ 10, 12. Similarly, the United States government has expressed its belief that the adjudication of this suit would cause tension between the United States and South Africa and would serve to hamper the policy of encouraging positive change in developing countries via economic investment. *See* Statement of Interest of the United States, dated October 30, 2003. As the *Sosa* Court made clear, these opinions as to the foreign relations consequences of this action certainly deserve great weight. *See Sosa*, 124 S.Ct. at 2766 n. 21 (mentioning this case specifically and stating that "[i]n such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy").

In a world where many countries may fall considerably short of ideal economic, political, and social conditions, this Court must be extremely cautious in permitting suits here based upon a corporation's doing business in countries with less than stellar human rights records, especially since the consequences of such an approach could have significant, if not disastrous, effects on international commerce. Moreover, to infer such causes of action under the ATCA would expand precipitously the jurisdiction of the federal courts and would not be consistent with the "extraordinary care and restraint" that this Court must exercise in recognizing new violations of cus-

tomary international law. *See Flores*, 343 F.3d at 154; *cf. Thompson v. Oklahoma*, 487 U.S. 815, 854–55, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (O'Connor, J., concurring) (discussing the danger of hastily deciding that certain practices have become customary).

Finally, far from there being a congressional mandate to find a cause of action here, history indicates that Congress, consistent with most other world powers, supported and encouraged business investment in apartheid South Africa. The Comprehensive Anti–Apartheid Act of 1986, 100 Stat. 1086, placed a minimal amount of restrictions on business activities with South Africa. This policy of constructive engagement was similar to the policies of many of the world powers at the time. *See* Declaration of Lord Renwick, dated July 9, 2003 at ¶¶ 9–13 (explaining that the United Kingdom believed that investment in South Africa was the best way to work towards change); Declaration of Rudolf Dolzer, dated July 9, 2003 at ¶¶ 3, 25, 30 (same with regards to Germany); Declaration of Mathias–Charles Krafft, dated July 4, 2003 at ¶¶ 5, 9 (Switzerland). As the government makes clear in this case, the United States still relies on the tool of economic investment as a means to achieve greater respect for human rights and a reduction in poverty in developing countries. *See* Statement of Interest of the United States, dated October 30, 2003. Therefore, under the framework set forth by the Court in *Sosa*, this Court finds that doing business in apartheid South Africa is not a violation of international law that would support jurisdiction in federal court under the ATCA.

Therefore, this Court finds that there is no subject matter jurisdiction under the ATCA, and thus all

claims thereunder, including those for human rights violations, crimes against humanity, unfair labor practices, and all other premised under international law, must be dismissed. Because this Court finds no cause of action under international law, plaintiffs have failed to state claims upon which to ground jurisdiction under 28 U.S.C. §§ 1331 and 1332.[18]

### B. Digwamaje Plaintiffs' Claims Under the TVPA and RICO

The Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 note, establishes a civil action against an "individual who, under actual or apparent authority, or color of law, of any foreign nation" subjects another to "torture" or "extrajudicial killing." 28 U.S.C. § 1350 note. In order to hear an action under this provision, the Court must be satisfied that plaintiff has exhausted all remedies in the place where the conduct occurred. *Id.*

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[18] This Court does not, and needs not, decide whether cases dealing with violations of the law of nations may be brought under federal question jurisdiction. However, the Court in *Sosa* seemed to indicate that the articulating of new international law violations is unique to the ATCA. *See* Sosa, 124 S.Ct. at 2765 n. 19.

There is no diversity jurisdiction as to Digwamaje plaintiffs because citizens of New York appear as both plaintiffs and defendants. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806). Khulumani and Ntsebeza plaintiffs utterly fail to plead facts that show that diversity jurisdiction exists. *See John Birch Soc. v. Nat'l Broadcasting Co.*, 377 F.2d 194, 197–98 (2d Cir.1967); *Equitable Life Assurance Soc. v. Alexander Grant & Co.*, 627 F.Supp. 1023, 1025–26 (S.D.N.Y. 1985). Therefore, all state law claims are likewise dismissed, as this Court does not have jurisdiction to hear them.

Here, defendants did not engage in torture or extrajudicial killings. Because this is abundantly clear, Digwamaje plaintiffs rely on the concept of aider and abettor liability to make the necessary connection between defendants and the prohibited conduct. Plaintiffs again look to Judge Wood's decision in *Wiwa* for support. *See Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 WL 319887, at *15–16 (S.D.N.Y. Feb.28, 2002) (finding that aider and abettor liability is justified under the TVPA because of its language and legislative history).

This Court believes that *Wiwa* is distinguishable. In *Wiwa*, defendants were found to be acting under color of law in the perpetration of torture and extrajudicial killings. *See id.* at *14–15. Here, defendants were not acting under color of law. *See supra* part A.1. Since a prerequisite to TVPA liability is that the individual be acting under color of law, this Court finds that creating aider and abettor liability for private actors not acting under color of law would be inconsistent with the statute and precluded by *Central Bank*.

Because this Court finds that Digwamaje plaintiffs have failed to state a claim under the TVPA, that cause of action must be dismissed.[19]

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[19] The Court need not consider defendants' arguments that plaintiffs' TVPA claim is otherwise barred by the statute of limitations, by failure to exhaust remedies in South Africa, or by the non-applicability of the statute to corporate defendants. *Compare Friedman v. Bayer Corp.*, No. 99–CV–3675, 1999 WL 33457825, at *2 (E.D.N.Y. Dec.15, 1999) (finding that TVPA did not apply to corporations), and *Beanal v. Freeport–McMoRan, Inc.*, 969 F.Supp. 362, 382 (E.D.La.1997), *with Sinaltrainal v. Coca–Cola Co.*, 256 F.Supp.2d 1345, 1358–59 (S.D.Fla.2003) (al-

Digwamaje plaintiffs' final claim is that defendants violated several provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), codified at 18 U.S.C. § 1962(b), (c), and (d). These provisions make it unlawful, among other things, "for any person employed by or associated with any enterprise ... to conduct or participate ... in the conduct of such enterprise's affairs through a pattern of racketeering activity," § 1962(c), for such person to acquire an interest in any such enterprise "through a pattern of racketeering activity," § 1962(b), or for a person to conspire to do either of those two activities, § 1962(d).

Because RICO is silent as to its extraterritorial application, this Court must determine if Congress would have intended to exercise jurisdiction over this predominantly foreign matter. *See North South Fin. Corp. v. Al–Turki*, 100 F.3d 1046, 1051 (2d Cir.1996); *see also Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir.1975). In making this finding, the Court is guided by two tests that were borrowed from the international securities and antitrust fields—the conduct test and the effects test.

The conduct test is satisfied where conduct material to the activities occurred in the United States and directly caused the loss suffered by plaintiffs. *See North South*, 100 F.3d at 1051–52. Mere preparation and incidental conduct are insufficient to justify jurisdiction. *See Societe Nationale d'Exploitation Industrielle des Tabacs et Allumettes v. Salomon Bros. Int'l Ltd.*, 928 F.Supp. 398, 403–07 (S.D.N.Y.1996); *Philan Ins. Ltd. v. Frank B. Hall & Co.*, 748 F.Supp. 190, 194 (S.D.N.Y.1990).

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lowing suit against corporation under TVPA), *and Wiwa*, 2002 WL 319887, at *14 n. 16.

Here, there is no meaningful assertion that any conduct occurred in the United States which directly caused the injuries complained of in South Africa. Plaintiffs allege a panoply of racketeering activities that all took place in South Africa and caused the alleged loss in South Africa. *See* D. Compl. ¶ 512. The gravamen of this complaint deals with foreign actions, and therefore this Court finds that the conduct test is not satisfied. *See Giro v. Banco Espanol de Credito, S.A.*, No. 98 Civ. 6195, 1999 WL 440462, at *3 (S.D.N.Y. June 28, 1999).

The effects test is satisfied where the foreign activities have substantial direct effects in the United States, or where the conduct is intended to and does have an effect here. *See North South*, 100 F.3d at 1052. Remote and indirect effects, *see Consolidated Gold Fields Plc v. Minorco, S.A.*, 871 F.2d 252, 262 (2d Cir.1989), as well as generalized effects in the United States are insufficient to meet this standard, *see Bersch*, 519 F.2d at 988–89.

Here, besides the conclusory allegation that "Defendants' acts alleged herein have substantial effect within the United States," D. Compl. ¶ 514, there is an utter dearth of facts that would establish any effects whatsoever, much less substantial and direct ones. It is difficult to imagine how the alleged murders, tortures, crimes against humanity, and other heinous acts committed in South Africa had direct and substantial effects here, and why Congress would have intended to exercise jurisdiction over these actions instead of "leav[ing] the problem to foreign countries." *Bersch*, 519 F.2d at 985; *see El Cid, Ltd. v. New Jersey Zinc Co.*, 551 F.Supp. 626, 631 (S.D.N.Y.1982); *see also Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409,

417 n. 12 (8th Cir.1979); *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F.Supp.2d 1285, 1306 (S.D.Fla.2003).

Therefore, this Court rules that it does not have jurisdiction to hear this RICO claim.

Even if this Court does have jurisdiction over this claim, plaintiffs have failed to state an actionable RICO claim. Because this claim borders on the frivolous, this Court will refrain from highlighting every shortcoming. To state a claim, plaintiffs must plead that defendants formed a racketeering enterprise, which RICO defines to "include[ ] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The Courts have explained that an enterprise is " 'a group of persons associated together for a common purpose of engaging in a course of conduct,' the existence of which is proven 'by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.' " *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 173 (2d Cir.2004) (quoting *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)).

Here, drawing all reasonable inferences in favor of plaintiffs, this Court is at a loss to see anything even approaching a racketeering enterprise. Plaintiffs simply state that "Defendants corporations, and their agents and co-conspirators formed a RICO 'enterprise' " or "an association in fact." D. Compl. ¶¶ 503–04. It is unexplained what the "common purpose" of defendants was, or what "particular fraudulent course of conduct" was engaged in, or exactly how defendants, which are engaged in a multitude of

different industries, "work[ed] together to achieve such purposes." *First Capital Asset Mgmt.*, 385 F.3d at 174 (quoting *First Nationwide Bank v. Gelt Funding, Corp.*, 820 F.Supp. 89, 98 (S.D.N.Y.1993)). Conclusory allegations that a group of corporations, whose sole common feature was the doing of business in a nation of millions of people at some point in a period of over forty years, is a RICO enterprise are simply insufficient to survive a motion to dismiss. *See First Nationwide Bank v. Gelt Funding, Corp.*, 820 F.Supp. 89, 98 (S.D.N.Y.1993) (holding that the conclusion that "disparate parties were associated in fact by virtue of their involvement in the real estate industry in the 1980s" was simply insufficient to state a RICO claim).

Because plaintiffs have failed to state a claim under RICO, this cause of action must be dismissed.[20]

## CONCLUSION

For the foregoing reasons, the Court grants defendants' motion to dismiss each of plaintiffs' claims. Since the Court finds that there is no just reason for delay in the appeal of this issue, the Court directs the Clerk of the Court to enter judgment dismissing the Complaints as against defendants party to this motion pursuant to Fed.R.Civ.P. 54(b).

**It is SO ORDERED.**

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[20] Because of the paucity of the pleadings on the existence of a RICO enterprise, this Court finds no need to address the remaining elements of the RICO claim.

## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Sakwe Balintulo KHULUMANI, as personal representative of Saba Balintulo, Fanekaya Dabula, as personal representative of Lungile Dabula, Nokitsikaye Violet Dakuse, as personal representative of Tozi Skweyiya, Berlina Duda, as personal representative of Donald Duda, Mark Fransch, as personal representative of Anton Fransch, Sherif Mzwandile Gekiso, as personal representative of Ntombizodwa Annestina Nyongwana, Elsi Guga, as personal representative of James Guga, Joyce Hlophe, as personal representative of Jeffrey Hlophe, Nomvula Eunice Kama, as personal representative of Mncedisi Dlokova, Joyce Ledwaba, as personal representative of Samuel Ledwaba, Johana Lerutla, as personal representative of Matthews Lerutla, Frieda Z. Lukhulei, as personal representative of Tokkie Lukhulei, Elizabeth Maake, as personal representative of Jackson Maake, Architon Madondo, as personal representative of Mandla Madondo, Benjamin Maifadi, Tshemi Makedama, as personal representative of Lugile Makedama, Mabel Makupe, as personal representative of Andrew Makupe, Mabel Malobola, as personal representative of Malobola Mbuso, Evelyn Matiso, as personal representative of Pitsi Matiso, Betty Mgidi, as personal representative of Jeffrey Mgidi, Elizabeth Mkhonwana, as personal representative of Obed Mkhonwana, Catherine Mlangeni, as personal representative of Bheki Mlangeni, Cecil Mlanjeni, as personal representative of Kele Mlanjeni, Samuel Morudu, as personal representative of Sannah P. Leslie, Tshidiso Motasi, as personal rep-

resentative of John and Penelope Moloke, Willie Nelani, as personal representative of Mongezi Nelani, Catherine Ngqulunga, as personal representative of Brian Ngqulunga, Catherine Phiri, as personal representative of Thomas Phiri, Elizabeth Sefolo, as personal representative of Harold Sefolo, Maria Sibaya, as personal representative of Jeffrey Sibaya, Patricial M. Songo, as personal representative of Dipulo Songo, Mpolontsi Tyote, as personal representative of Boyboy Tyote, Nomkhango Skolweni Dyantyi, Clifford Zixelile Fudukile, Windovoel Gaaje, Charles Hlatshwayo, Moses Hlongwane, Lesiba Kekana, Sanaki Mahlatshi, Robert Makana, Zakharia Fikile Mamba, Elliot Sithembiso Marenene, Alfred Masemola, Maureen Thandi Mazibuko, Michael Mbele, Laetitia Nombambo Mfecane, as personal representative of Rubin Mfecane, Dennis Mlandeli, Tefo Mofokeng, Motlaletsatsi Molatedi, Azariel Molebeleli, Simon Molotsi, Lina Moreane, as personal representative of Albert Xaba, Thabiso Samuel Motsie, Sonto Ndlovu, Mangindiva Robert Rhenene, Thobile Sikani, Bubele Stefane, Noluthando Biletile, Leslie Mncedisi Botya, Leon Dukasche, Elsie Gishi, Dorthia Gomo-Pefile, Zamikhaya Bishop Khali, James Magabana, Nosipho Manquba, Notathu Eugenia Matomela, Nomisa Thersia May, Mbongeni Nelson Mbeshu, Mzuhlangena Nama, Elias Ngamani, as personal representative of Elizabeth Nagamani, Geshia Ngoxza, Lucas Ndukwayibuzwa Ngwenyana, Wellinton Mtyukato Nkosiphendule, Vuyani Nongcama, Sindiswa Mirriam Nunu, Thulani Nunu, Boniwe Phalaza, Pathiswa Pringane, as personal representative of Mthozama Theophilus Pringane, Mthutuzeli Sikani, Noluthando Siletile, Thembeka Victoria Siphaho, Johannes Titus, Mpolontsi

Tyotes, Mthuzimele Meford Yamile, Ntunani William Zenani, Thandiwe Shezi, Elias B. Boneng, Dennis Vincent Frederick Brutus, Moraloki A. Kgobe, Reuben Mphela, Lulamile Ralrala,

*Plaintiffs-Appellants,*

v.

BARCLAY NATIONAL BANK LTD., British Petroleum, PLC, ChevronTexaco Corporation, ChevronTexaco Global Energy, Inc., Citigroup, Inc., Commerzbank, Credit Suisse Group, DaimlerChrysler AG, Deutsche Bank AG, Dresdner Bank AG, ExxonMobil Corporation, Ford Motor Company, Fujitsu, Ltd., General Motors Corporations, International Business Machines Corp., J.P. Morgan Chase, Shell Oil Company, and UBS AG,

*Defendants-Appellees,*

AEG Daimler-Benz Industrie, Fluor Corporation, Rheinmetall Group AG, Rio Tinto Group, Total-Fina-Elf and Doe Corporations,

*Defendants.*

Lungisile Ntsebeza, Hermina Digwamaje, Andile Mfingwana, F.J. Dlevu, Lwazi Pumelela Kubukeli, Frank Brown, Sylvia Brown, Nyameka Goniwe, Sigqibo Mpendulo, Dorothy Molefi, Themba Mequbela, Lobisa Irene Digwamaje, Kaelo Digwamaje, Lindiwe Petunia Leinana, Matshidiso Sylvia Leinana, Kelebogile Prudence Leinana, David Motsumi, Sarah Nkadimeng, Moeketsi Thejane, Moshoeshoe Thejane, Pascalinah Bookie Phoofolo, Khobotle Phoofolo, Gladys Mokgoro, Jongani Hutchingson, Sefuba Sidzumo, Gobusamang Laurence Lebotso, Edward Thapelo Tshimako, Rahaba Mokgothu, Jonathan Makhudu Lediga, Anna Lebese, Sipho Stanley Lebese, William Nbobeni, John Lucas

Ngobeni, Clement Hlongwane and Masegale Monnapula,

*Plaintiffs-Appellants,*

Sakwe Balintulo Khulumani, P.J. Olayi, Wellington Baninzi Gamagu, Violations of Pass Laws, unlawful detention 1981-1983, torture subjected to discriminatory labor practices 1981 and William H. Durham,

*Plaintiffs,*

v.

Daimler Chrysler Corporation, National Westminster Bank PLC, Colgate Palmolive, Barclays Bank Plc, UBS AG, Citigroup Inc., Deutsche Bank AG, Dresdner Bank AG, Commerzbank AG, Ford Motor Company, Holcim, Inc., Exxon Mobil Corporation, Shell Oil Company, J.P. Morgan, Minnesota Mining and Manufacturing Co. (3M Co.), General Electric Company, Bristol-Meyers Squibb Co., E.I. Dupont De Nemours, Xerox Corporation, IBM, General Motors, Honeywell International, Inc., Bank of America, N.A., The Dow Chemical Company, Coca-Cola Co., Credit Agricole S.A., Hewlett-Packard Company, Emschemie (North America) Inc., Chevron Texaco Corporation, American Isuzu Motors, Inc. and Nestle USA, Inc.,

*Defendants-Appellees,*

Sulzer AG, Schindler Holding AG, Anglo-American Corporation, DeBeers Corporation, Novartis AG, Banque Indo Suez, Credit Lyonnais, and Unknown Officers and Directors of Danu International, Standard Chartered, P.L.C., Corporate Does, Credit Suisse Group, Citigroup AG, Securities Inc., as Successor to Morgan Guaranty, Manufacturers Hannover, Chemical Bank & Chase Manhattan Bank, Unisys Corporation, Sperry Corporation, Burroughs Corporation, ICL, Ltd., Amdahl Corp., Computer

Companies, John Doe Corporation, Holcin, Ltd., Henry Blodget, Justin Baldauf, Kristen Campbell, Virginia Syer Genereux, Sofia Ghachem, Thomas Mazzucco, Edward McCabe, Deepak Raj, John 1-10 Doe, Oerlikon Contraves AG, Oerlikon Buhrle AG, Corporate Does 1-100, Royal Dutch Petroleum Co., Shell Transport & Trading Company PLC and Shell Petroleum, Inc., Merrill Lynch & Co. Inc., Kenneth Seymour,

*Defendants.*

**Present**: Robert A. Katzmann, Peter W. Hall, Circuit Judges; Edward R. Korman,* District Judge

**Nos. 05-2141-CV, 05-2326-CV.**

Nov. 27, 2007.

**ORDER**

By opinion dated October 12, 2007, we vacated the district court's dismissal of the Plaintiffs' claims under the Alien Tort Claims Act and remanded to the district court for further proceedings. Pursuant to Rule 41 of the Federal Rules of Appellate Procedure, Defendants-Appellees, thirty-six domestic and foreign corporations (hereinafter "the Corporations"), have moved this Court to stay issuance of the mandate in this action, pending their petition for certiorari to the Supreme Court.[1] By order dated November 9, 2007, we DENIED the motion by majority vote of the panel. We write to explain the basis for our decision; Judge Korman, dissenting from the denial,

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* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

[1] We note that the Corporations did not petition for a panel rehearing or rehearing en banc.

writes separately. To grant a stay at this juncture would deprive the district court of the opportunity to address the principal issue upon which the Corporations seek Supreme Court review: whether various prudential doctrines, including case-specific deference to the political branches, counsel dismissal of these claims. We expressly did not decide this issue on the present record and remanded to the district court for a determination in the first instance.

Rule 41 requires the party seeking a stay of the mandate to show that "the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R.App. P. 41(d)(2)(A). Even if the movant makes the required showing, our decision to grant the stay is a matter of discretion. 20A Moore's Federal Practice § 341.14 (3d ed.1997) (citing *United States v. Holland,* 1 F.3d 454, 456 (7th Cir.1993)). This Court has not ruled adversely to the Corporations on the issues of case-specific deference or the political question doctrine. Notwithstanding the absence of such a ruling, the Corporations argue, in attempt to show good cause, that "the maintenance of these actions ... is an affront to South Africa's sovereignty, an irritant to U.S. foreign relations with that country and others, and a disincentive to future multinational corporate investment in developing economies." Mot. to Stay at 11-12.

The critical weakness in the Corporations' motion is its premise that this issue has been sufficiently developed as to be fit for review by the Supreme Court. Contrary to the Corporations' suggestion, "the district court explicitly refrained from addressing the defendants' arguments that the ATCA claim presented a non-justiciable political question." *Khulumani v. Barclay Nat'l Bank Ltd.,* Nos. 05-2141-cv, 05-

2326-cv, slip op. at 12 (2d Cir.2007) (*per curiam*); *see also In re S. African Apartheid Litig.*, 346 F.Supp.2d 538, 543 n. 4 (S.D.N.Y.2004) ( "Defendants also argue that there is no case or controversy for this Court to hear under Article III of the Constitution... because the matter is a non-justiciable political question.... Given the Court's finding that defendants are entitled to relief on other grounds, the Court need not address these remaining grounds for defendants' motion.").[2] Accordingly, we did not address the applicability of case-specific deference or other prudential doctrines because such questions require the type of careful case-by-case analysis to which district courts are better suited in the first instance. *See Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir.1995). We also note that it has been several years since this issue has been briefed, and the parties should be able to develop the record to take into account intervening developments. For these same reasons, we consider the Corporations' application for Supreme Court review to be premature. And in the absence of an adverse ruling on the issue of case-specific deference or other prudential doctrines, the Corporations' claim that they have demonstrated a likelihood of irreparable injury without a stay is unpersuasive.

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[2] Nor has the district court had the opportunity to address the competing views on this issue. *Compare* Brief for the United States of America as Amicus Curiae, Brief for South Africa as Amicus Curiae, *and* Media Statement of Minister for Justice and Constitutional Development Brigitte Mabandla (Oct. 19, 2007), *with* Brief for South African Organizations, Unions and Political Parties *and* Brief for Commissioners and Committee Members of South Africa's Truth and Reconciliation Commission as Amici Curiae (including the views of Archbishop Desmond Tutu).

We expect that the district court on remand will rule expeditiously; at that point, the parties can decide whether, and on what grounds, to pursue further appeals. Should the parties pursue further appeals, we (and, if necessary, the Supreme Court) will have the benefit of a fully developed foundation upon which to proceed. For the foregoing reasons, the motion is DENIED.

KORMAN, District Judge, dissenting:

I assume familiarity with the background of this case in which the defendants have moved to stay the mandate for ninety days so that they may file a petition for a writ of certiorari. While the plaintiffs have declined to consent to the motion, they have made no showing of prejudice that would result from staying the mandate. Nevertheless, the majority has voted to deny the application. I write to explain my reasons for dissenting from that denial.

(1)

Under Fed. R.App. P. 41(d)(2)(A), a motion to stay the mandate pending a petition for a writ of certiorari "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." This case involves substantial issues regarding the application of the ATCA of the kind that arise with increasing frequency. Indeed, this was the reason the Supreme Court gave for granting certiorari in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 699 (2004). More significantly, this case "implicates considerations of foreign policy ... threatened by the [panel's] decision" that "weigh[ ] in favor of a stay." *See Wald v. Regan*, 708 F.2d 794, 803 (1st

Cir.1983) (Breyer, *J.*).[1] Indeed, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Supreme Court explained that it had "granted certiorari because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch...." *Id.* at 407.

This accurately describes the threshold issue in this case as to which the real party in interest is the Republic of South Africa. Specifically, invoking the doctrine of international comity, it asked the district court to dismiss the case, and it asked us to apply the same doctrine to affirm the dismissal by the district court judge. The Executive Branch joined in that application because of the foreign policy implications that the rejection of South Africa's plea would have on our relations with that country as well as those of "[v]arious foreign governments, including the United Kingdom and Canada, which have also approached us via diplomatic channels to express their profound concern that their banks, corporations and other entities have been named as defendants", A. 01090-9, and their "strong belief that the issues raised in the litigation are most appropriately handled through South Africa's domestic process." *Id.*

Under these circumstances, the defendants are acting as surrogates for the Republic of South Africa in petitioning for certiorari and seeking a stay of the mandate. Indeed, after the majority reversed the

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[1] While the Court of Appeals in *Wald* ultimately denied the application to stay the mandate based on its assessment that the Supreme Court was unlikely to reverse, the Supreme Court granted certiorari and reversed on the merits. *See Wald v. Regan*, 468 U.S. 222 (1984).

judgment dismissing the complaint, the Republic of South Africa, speaking through its Minister of Justice, issued a statement reiterating its "view that the case is directly related to the sovereignty of the South African state and should be resolved through South Africa's own democratic process." Ministry of Justice and Constitutional Development Republic of South Africa, Media Statement: Apartheid Lawsuit – US court of appeal decision (Oct. 19, 2007).

Thus, the issue that the Supreme Court will be asked to consider is the plea of the Republic of South Africa that the Judicial Branch of the United States not meddle in its affairs by entertaining complaints in which the United States does not have any interest – a position supported by a number of scholars, including some of the most committed human rights advocates. *See, e.g.*, Beth Stephens, Sosa v. Alvarez-Machain, *"The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 Brook. L.Rev. 533, 562 (2005). Because "the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the role of the Judicial Branch", *Sabbatino*, 376 U.S. at 407, "the certiorari petition would present a substantial federal question." Fed. R.App. P. 41(d)(2)(A).

More than that, this is a case in which the Supreme Court has already indicated a special interest. In what can only be described as an extraordinary discussion of this case, the Supreme Court provided guidance with respect to how South Africa's plea should be considered in its *Sosa* opinion. Thus, after formulating the doctrine of case-specific deference out of concern that "many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign

policy consequences," *Sosa*, 542 U.S. at 727-28, the Supreme Court turned to the present case:

> For example, there are now pending in Federal District Court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa. *See In re South African Apartheid Litigation*, 238 F.Supp.2d 1379 (JPML 2002) (granting a motion to transfer the cases to the Southern District of New York). The Government of South Africa has said that these cases interfere with the policy embodied by its Truth and Reconciliation Commission, which "deliberately avoided a 'victors' justice' approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill." Declaration of Penuell Mpapa Maduna, Minister of Justice and Constitutional Development, Republic of South Africa, reprinted in App. to Brief for Government of Commonwealth of Australia et al. as *Amici Curiae* 7a, ¶ 3.2.1 (emphasis deleted). The United States has agreed. *See* Letter of William H. Taft IV, Legal Adviser, Dept. of State, to Shannen W. Coffin, Deputy Asst. Atty. Gen., Oct. 27, 2003, reprinted in *id.*, at 2a. *In such cases, there is a strong argu-*

> *ment that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy.*

*Id.* at 733 n.21 (emphasis added) (citation omitted). The majority here brushed off this advice, saying that it "views summary dismissal at the behest of a footnote premature." *Khulumani v. Barclay Nat'l Bank Ltd.*, Nos. 05-2141, 05-2326, slip op. at 9110 (2d Cir. Oct. 12, 2007). Nevertheless, the discussion of this case in *Sosa* provides additional support for the argument that certiorari may be granted. Moreover, the absence of any compelling reason for rejecting the plea of the Republic of South Africa, suggests that if certiorari is granted, the judgment may be reversed. Indeed, a tally of the seventy-five cases, in which the Supreme Court published Slip Opinions, *Per Curiams*, and Original Case Decrees in the 2006-2007 term, indicated that over two-thirds, fifty-two precisely, were either reversed or vacated.

This case not only presents a "substantial question", but there is also "good cause" to stay the mandate. See Fed. R.App. P. 41(d)(2)(A). The continued prosecution of this matter constitutes a continuing insult to the Republic of South Africa and a continuing irritant to our relationship with that post-apartheid government. More significantly, as previously noted, on this issue, the Republic of South Africa is the aggrieved party and the real party in interest. The remand will only cause it more harm by enmeshing it in the litigation. Indeed, one footnote in the *per curiam* opinion specifically refers to the failure of the district court judge to decide the plaintiffs' motion to strike the Statement of Judgment filed on behalf of the Republic of South Africa by its Minister

of Justice, *Khulumani v. Barclay Nat'l Bank Ltd.*, slip op. at 7 n.3. This otherwise pointless observation suggests that the Republic of South Africa could be forced into an evidentiary hearing to defend the validity of its objection. Indeed, in its opinion denying the motion to stay the mandate, the majority observes that the district court has not:

> had the opportunity to address the competing views on this issue. *Compare* Brief for the United States of America as Amicus Curiae, Brief for South Africa as Amicus Curiae, *and* Media Statement of Minister for Justice and Constitutional Development Brigitte Mabandla (Oct. 19, 2007), *with* Brief for South African Organizations, Unions and Political Parties *and* Brief for [the former] Commissioners and Committee Members of South Africa's Truth and Reconciliation Commission as Amici Curiae (including the views of Archbishop Desmond Tutu).

Majority Op. *ante* at 5 n.2. The latter *amicus* brief argues that, contrary to the position of the South African government, the current litigation "does not conflict in any manner with the policies of the South African government, or the goals of the South African people, as embodied in the TRC." TRC Br. at 2.[2] But it is only for the South African gov-

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[2] The *amicus* brief of the South African Organizations, Unions and Political Parties simply contains a brief expression of support for the *amicus* brief filed by the former Commissioners of the TRC.

ernment, through its elected representatives, to say whether this litigation conflicts with its policies, just as it earlier decided for the same reasons to reject the Truth and Reconciliation Commission's recommendation that a once-off wealth tax be imposed on all corporations. Surely this is not a dispute for a United States district judge to resolve. *See Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 586 (2d Cir. 1993) (Newman, *J.*). Yet, the majority contemplates a remand that would subject a foreign democratic nation to the indignity of having to defend policy judgments that have been entrusted to it by a free people against an attack by private citizens and organizations who have lost the political battle at home. This dispute is not the business of the Judicial Branch of the United States. A stay is warranted to allow the Supreme Court to determine whether to permit such a proceeding to go forward.

(2)

The majority justifies the denial of the stay of the mandate on the grounds that one of the issues the defendants identified in their motion – the issue of case-specific deference – has not "been sufficiently developed to be fit for review by the Supreme Court." Majority Op. *ante* at 4. This defect is said to result from the fact that "the district court explicitly refrained from addressing this issue" and the majority's consequent failure to "address the applicability of case-specific deference . . . ." *Id.*

Passing over the accuracy of the majority's description of the district court's opinion, the defect asserted by the majority is not an impediment sufficient to deny a stay of the mandate for a number of reasons. The "traditional rule," as the Supreme Court has observed, "precludes a grant of certiorari

only when the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (Scalia, *J.*) (internal quotation marks omitted). This "rule operates (as it is phrased) in the disjunctive . . . ." *Id.* Thus it permits review where an issue was passed upon below, even though not argued, and where the issue was argued and not passed upon. Indeed, the Supreme Court is authorized to grant certiorari before judgment by the Court of Appeals. 28 U.S.C. § 1254(1); *see, e.g., Mistretta v. United States*, 488 U.S. 361 (1989). While such discretionary review is unusual, the Supreme Court has considered issues not resolved by the Court of Appeals that "raise only [an] issue[ ] of law not calling for examination [and] appraisal of evidence . . . ." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 214 (1951). Indeed, it has exercised its discretion to consider an issue that had not been raised below and that it raised *sua sponte*. *See Sibbach v. Wilson & Co.*, 312 U.S. 1, 16 (1941). Whether the Supreme Court will deny certiorari and allow this case to go forward, simply because two of the three members of the panel declined to reach the issue, will ultimately depend on its assessment of the importance of the issue and the consequences of permitting the kind of proceeding the majority envisions to go forward. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976).

In sum, the unjustified refusal of the majority to address the issue of case-specific deference is not a basis to deny the motion to stay the mandate. On the contrary, this case raises an additional issue, namely, whether it was proper for a majority of the panel to decline to reach the issue. In my separate opinion, I addressed the significant considerations of policy that warrant reaching the issue of case-

specific jurisdiction, even if it had not been decided by the district court. More significantly, I demonstrated that the majority was compelled to reach the issue because it involved the subject-matter jurisdiction of the district court. This argument turned on the jurisdiction-conferring language of the ATCA, the manner in which it had been construed in *Sosa*, and our own pre-*Sosa* precedent, beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876, 887-88 (2d Cir. 1980). *See Khulumani v. Barclay Nat'l Bank Ltd.*, slip op. at 9203-08. The *per curiam* opinion offered no response to this argument, and its refusal to reach the issue at the threshold is itself worthy of certiorari.

(3)

I have passed over the issue of whether the *per curiam* opinion accurately described the manner in which the district judge addressed the issue of case-specific jurisdiction. The majority repeats the assertion made in the *per curiam* opinion that "the district court explicitly refrained from addressing the defendants' arguments that the ATCA claim presented a non-justiciable-political question," *ante* at 4 (quoting *Khulumani v. Barclay Nat'l Bank Ltd.*, slip op. at 12 (*per curiam*)). This assertion, which implies that the district court judge was referring to the issue of case-specific jurisdiction, is predicated on footnote 4 of the district court opinion. *See In re South Africa Apartheid Litig.*, 346 F.Supp.2d at 543 n.4 (parenthetical omitted). The footnote reads as follows:

> Defendants also argue that there is no case or controversy for this Court to hear under Article III of the Constitution ... because the matter is a non-justiciable political question. *See*

> *Memorandum of Law in Support of Defendants' Joint Motion to Dismiss at 3-4.* Given the Court's finding that defendants are entitled to relief on other grounds, the Court need not address these remaining grounds for defendants' motion.

*Id.* (emphasis added). The italicized reference to the source of the defendants' argument is deleted from the quotation that appears in the majority opinion here and in the *per curiam* opinion. *Khulumani v. Barclay Nat'l Bank Ltd.*, slip op. at 9111-12. This omission is not without purpose.

The Memorandum of Law in Support of the Defendants' Joint Motion to Dismiss ("Joint Motion"), which Judge Sprizzo expressly referenced in the part of his opinion declining to address the issue, argued (in relevant part) that the "adjudication of plaintiffs' claim would require a court to pass on the merits of political questions that were resolved by the executive and legislative branches of the United States government in favor of commerce with South Africa." Joint Motion at 3. It did not address the issue of case-specific deference. Indeed, the defendants' motion predated the State Department's Statement of Interest and was filed a year before *Sosa* was decided.

When the defendants subsequently raised the argument, Judge Sprizzo did not "explicitly refrain" from addressing it. On the contrary, he spoke to it directly. Specifically, he observed that, "even though the *Sosa* decision did not deliver the definitive guidance ... that some had come to expect, nevertheless it does dispose of the issues raised by these motions." *In re South Africa Apartheid Litig.*, 346 F.Supp.2d at

547. Judge Sprizzo then reviewed each of the considerations that he understood *Sosa* required "courts to consider in determining whether conduct should be found to be encompassed by the ATCA." *Id.* One such consideration was that "courts must consider the foreign relations consequences of finding that conduct is encompassed by the ATCA, since entertaining such suits can impinge on the discretion of the legislative and executive branches of this country as well as those of other nations." *Id.* at 548 (citing *Sosa*, 542 U.S. at 733 n.21). Speaking to the issue of recognizing a cause of action for aiding-and-abetting a violation of a norm of customary international law, he alluded generally to "the collateral consequences and possible foreign relations repercussions that would result from allowing courts in this country to hear civil suits for the aiding-and-abetting of violations of international norms around the globe." *Id.* at 551. "To do so," he held, "would not be consistent with the 'restrained conception' of new international law violations that the Supreme Court has mandated for the lower federal courts." *Id.* Of particular relevance is the following detailed discussion of this consideration, as applied to the specific facts of this case:

> [A]s *Sosa* points out, this Court must be aware of the collateral consequences that would result from finding a new international law violation that would support ATCA jurisdiction. In this case, those consequences are not only far-reaching but would raise the prospect of serious impediments to the flow of international commerce. Indeed, the South African government has indicated that it does not support this litigation and that it

> believes that allowing this action to proceed would preempt the ability of the government to handle domestic matters and would discourage needed investment in the South African economy. *See* Declaration of Minister Penuell Mpapa Maduna, dated July 11, 2003 at ¶¶ 10, 12. Similarly, the United States government has expressed its belief that the adjudication of this suit would cause tension between the United States and South Africa and would serve to hamper the policy of encouraging positive change in developing countries via economic investment. *See* Statement of Interest of the United States, dated October 30, 2003. As the *Sosa* Court made clear, these opinions as to the foreign relations consequences of this action certainly deserve great weight. *See Sosa*, 124 S.Ct. at 2766 n.21 (mentioning this case specifically and stating that "in such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy").

*Id.* at 553-54. The advice provided by *Sosa* on the issue of case-specific deference was clearly one of the considerations underlying Judge Sprizzo's opinion.

(4)

While I have focused on the case-specific deference/international comity issue because it alone justifies a stay of the mandate, that issue is not the only

one defendants intend to raise in their certiorari petition. They also intend to argue that "[t]he court's recognition of claims for aiding and abetting violations of international law is inconsistent with *Sosa*." Mot. to Stay the Mandate at 4. This claim has particular force because it necessarily includes the following issues addressed extensively in my separate opinion: (1) whether customary international law provides a basis for imposing liability on corporate entities[3]; (2) whether the standard for imposing such liability (that Judge Katzmann and I agree upon), which did not emerge until after the defendants engaged in the conduct alleged in the complaints, may be applied retroactively; and, (3) whether allowing causes of action, alleging a violation of the customary international law norm of genocide, which Congress expressly indicated its intent to proscribe, is an abuse of our discretion, *see Khulumani v. Barclay Nat'l Bank Ltd.*, slip op. at 9228-30.[4] These are substantial issues warranting a stay of the mandate.

## CONCLUSION

In sum, an arbitrary refusal by two members of a panel of the Court of Appeals to avoid reaching an is-

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[3] Because this goes to the issue of subject-matter jurisdiction, the fact that it was not argued by the defendants is not material. *See Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) ("A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance.").

[4] The majority declined to reach this issue, although at least one member of the majority recognized that the issue was an open one. *See Khulumani v. Barclay Nat'l Bank Ltd.* slip op. at 9154 n.18 (Op. of Judge Katzmann). Because it goes to the issue of subject-matter jurisdiction, the majority did not have the discretion to pass on it. *See Kontrick*, 540 U.S. at 455.

sue does not insulate the issue from Supreme Court review, nor does it insulate from review the propriety of its refusal to address the issue. I have learned from Judge Breyer's experience in *Wald v. Regan*, 708 F.2d 794, 803 (1st Cir. 1983), *rev'd*, 468 U.S. 222 (1984), the dangers of predicting the outcome of proceedings in the Supreme Court. I suggest, however, that this case is worthy of certiorari and that there are no compelling reasons for denying the motion to stay the mandate. On the contrary, the prejudice to the Republic of South Africa and to our relationship with that post-apartheid democracy counsel against permitting the proceedings the majority envisions on remand from going forward.

While I vote to grant the motion to stay the mandate, I add these words of concern regarding the apparent intention of the defendants to take the full ninety days they have to file a petition for a writ of certiorari. The filing of a petition in early to mid-December would make it possible for the Supreme Court to decide the case in its current term, should it grant the petition. Delaying the filing of the petition until mid-January makes that impossible and could delay the disposition until 2009. The defendants are represented by some of the nation's leading law firms, including a firm with one of the most highly-regarded Supreme Court practices in the nation. There is no reason why they should not be able to file the petition promptly. The prejudice of the delay is not to the plaintiffs, but to the Republic of South Africa.

Accordingly, for the foregoing reasons, I vote to grant the motion to stay the mandate. Although the majority has voted to deny the motion to stay the mandate, the district court judge has discretion to

await the outcome of the proceedings in the Supreme Court, just as we sometimes do before deciding a case involving an issue that the Supreme Court is hearing or has agreed to hear.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: */s/ Richard Alcantara*
Richard Alcantara, Deputy Clerk

## APPENDIX D

JAMES B. COMEY
United States Attorney for the
Southern District of New York
By: DAVID S. JONES (DJ-5276)
Assistant United States Attorney
33 Whitehall Street, 8th Floor
New York, New York 10004
Tel.: (212) 637-2739

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
In re South African Apartheid Litigation
MDL No. 1499 (JES)

## STATEMENT OF INTEREST OF THE UNITED STATES

By letter to the Honorable William H. Taft, IV, Legal Adviser of the United States Department of State, the Court "inquire[d] whether the Department of State has an opinion as to whether adjudication of these cases would have an adverse impact on the interests of the United States and, if so, the nature and significance of any such impact." *See* Letter from the Honorable John E. Sprizzo of August 7, 2003, annexed hereto as Exhibit A. Pursuant to 28 U.S.C. § 517[1], the Attorney General, on behalf of the Department of State, respectfully submits this Statement of Interest in response to the Court's inquiry.

Attached hereto as Exhibit B is a letter, dated October 27, 2003, from William H. Taft, IV, Legal Ad-

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[1] "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any ... district in the United States ... to attend to any [] interest of the United States." 28 U.S.C. § 517.

viser, United States Department of State, to Shannen Coffin, Esq., United States Department of Justice, which provides the Department of State's views in response to the Court's inquiry concerning the interests of the United States in this matter.

Dated: New York, New York
October 30, 2003

Respectfully submitted,
JAMES B. COMEY
United States Attorney for the
Southern District of New York
Attorney for the United States of America

By: /s/
DAVID S. JONES (DJ-5276)
Assistant United States Attorney
33 Whitehall Street, 8th Floor
New York, New York 10004
Tel. (212) 637-2739

**Exhibit A**

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**
**UNITED STATES COURTHOUSE**
**NEW YORK, NEW YORK 10007**

August 7, 2003

Honorable William H. Taft, IV
Office of the Legal Adviser
United States Department of State
2201 C Street, N.W., Room 6423
Washington, DC 20520

Re: In re South African Apartheid Litigation, MDL No. 1499 (JES)

Dear Mr. Taft:

Although not entirely identical in their allegations, the complaints in the ten actions comprising the above-captioned multidistrict litigation currently pending before me generally charge dozens of multinational corporations with human rights violations stemming from their alleged business dealings in South Africa during the apartheid era.

On November 6, 2003, I will hear oral argument on defendants' joint motion to dismiss the actions due to lack of subject matter jurisdiction. It is the defendants' position that the cases should be dismissed because, among other reasons, plaintiffs' claims are not justiciable insofar as adjudication would require a court to resolve questions entrusted to the political branches of our government. Defendants also contend that plaintiffs', allegations fail to plead a violation of international law or a United States treaty as required by the Alien Tort Statute, 28 U.S.C. § 1350. Plaintiffs' response to defendants' motion is scheduled to be submitted on or before September 8, 2003.

I recently received a declaration from Penuell Mpapa Maduna, the Minister of Justice and Constitutional Development of the Republic of South Africa, in which Dr. Maduna conveyed to me the official position of his government that the proceedings currently before me impermissibly interfere with South Africa's efforts to address political matters in which it, as a foreign sovereign, has a predominant interest.

In light of Dr. Maduna's declaration, I thought it prudent to inquire whether the Department of State has an opinion as to whether adjudication of these cases would have an adverse impact on the interests of the United States and, if so, the nature and significance of any such impact. Since, as mentioned above, the cases are scheduled for oral argument on November 6, 2003, your response prior to that date would be appreciated.

I enclose for your convenience copies of the complaints in two of the actions, as well as copies of defendants' joint motion to dismiss and Dr. Maduna's declaration.

Very truly yours,

/s/
John E. Sprizzo
United States District
Judge

Enclosures

cc: Joseph H. Hunt
Counsel to the Deputy Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W., Room 3137
Washington, DC 20530

Jacqueline E. Byrks, Esq.
Cohen, Milstein, Hausfeld & Toll, P.L.L.C.
825 Third Avenue
30th Floor
New York, NY 10022-7519

Michael D. Hausfeld, Esq.
Cohen, Milstein, Hausfeld & Toll, P.L.L.C.
1100 New York Avenue, N.W.
Washington, DC 20005-3964

Edward D. Fagan, Esq.
Edward D. Fagan Associates
51 JFK Parkway
1st Floor West
Short Hills, NJ 07078

Jay J. Rice, Esq.
Nagel Rice Dreifuss & Mazie, L.L.P.
301 South Livingston Avenue
Livingston, NJ 07039

Paul M. Ngobeni, Esq.
Law Office of Paul M. Ngobeni
914 Main Street, Suite 206
East Hartford, CT 06108

Kweku J. Hanson, Esq.
Law Office of Kweku J. Hanson
487 Main Street, #12
East Hartford, CT 06106

Francis P. Barron, Esq.
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475

# Exhibit B

**THE LEGAL ADVISER**
**DEPARTMENT OF STATE**
**WASHINGTON**

October 27, 2003

Shannen W. Coffin
Deputy Assistant Attorney General
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W., Room 3137
Washington, D.C. 20530

Re: In Re South African Apartheid Litigation, MDL No. 1499 (S.D.N.Y.)

Dear Mr. Coffin:

I am writing in response to Judge John E. Sprizzo's letter of August 7, which is attached hereto, and request that the Department of Justice submit this response to the Court. Judge Sprizzo inquired whether the Department of State believes that adjudication of the above-captioned litigation would have an adverse impact on the interest of the United States and, if so, the nature and significance of that impact. The Department's views are set out below.

At the outset, I reiterate the long-standing opposition of the United States Government to, and its abhorrence of, the institution and practices of apartheid and our commitment to helping the people of South Africa overcome their tragic past.

With respect to litigation in U.S. courts by alleged victims of apartheid, an initial concern relates to the Alien Tort Statute, 28 U.S.C. § 1350, which we understand is a central basis for the current apartheid cases. The statute has been addressed by a number of courts over the past two decades, including the

Second Circuit in *Filartiga v. Pena-Irala*[1] and *Flores v. Southern Peru Copper Corporation*.[2] The United States Government has a substantial interest in the proper interpretation and application of this statute because it implicates profound separation of powers concerns and serious consequences for both the development and expression of the nation's foreign policy. The United States has recently taken the position in various pending cases that the Alien Tort Statute is a jurisdictional provision only and does not itself create any private causes of action. For the Court's convenience, I have attached a copy of the brief recently submitted to the U.S. Supreme Court by the United States in support of a petition for certiorari in *Sosa v. Alvarez-Machain* (No. 03-339).

More specifically with respect to the subject matter of the litigation, it is our view that continued adjudication of the above-referenced matters risks potentially serious adverse consequences for significant interests of the United States. The Government of South Africa has, on several occasions and at the highest levels, made clear its view that these cases do not belong in U.S. courts and that they threaten to disrupt and contradict its own laws, policies and processes aimed at dealing with the aftermath of apartheid as an institution. As Minister of Justice Maduna explained in his letter to the Court of July 11, 2003, the current Government of South Africa has taken extensive steps to promote reconciliation and redress for apartheid-era injustices. We note that the government pursuing these policies is broadly representative of the victims of the apartheid

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[1] 630 F.2d 876 (2d Cir. 1980).

[2] 343 F.3d 140 (2d Cir. 2003).

regime and believe that this government is uniquely charged with a popular mandate to deal with the legacy of apartheid.

Support for the South African government's efforts in this area is a cornerstone of U.S. policy towards that country. For that reason, we are sensitive to the views of the South African government that adjudication of the cases will interfere with its policy goals, especially in the areas of reparations and foreign investment, and we can reasonably anticipate that adjudication of these cases will be an irritant in U.S.-South African relations. To the extent that adjudication impedes South Africa's on-going efforts at reconciliation and equitable economic growth, this litigation will also be detrimental to U.S. foreign policy interests in promoting sustained economic growth in South Africa.

Various other foreign governments, including those of the United Kingdom and Canada, have also approached us via diplomatic channels to express their profound concern that their banks, corporations and other entities have been named as defendants. In light of their strong belief that the issues raised in the litigation are most appropriately handled through South Africa's domestic processes, we can anticipate possible, continuing tensions in our relations with these countries over the litigation.

We are also concerned that adjudication of the apartheid cases may deter foreign investment where it is most needed. The United States relies, in significant part, on economic ties and investment to encourage and promote positive change in the domestic policies of developing countries on issues relevant to U.S. interests, such as respect for human rights and reduction of poverty. However, the prospect of costly

litigation and potential liability in U.S. courts for operating in a country whose government implements oppressive policies will discourage U,S. (and other foreign) corporations from investing in many areas of the developing world, where investment is most needed and can have the most forceful and positive impact on both economic and political conditions. To the extent that the apartheid litigation in U.S. courts deters such investment, it will compromise a valuable foreign policy tool and adversely affect U.S. economic interests as well as economic development in poor countries.

We would be pleased to provide any additional information the Court may require.

Sincerely,

/s/
William H. Taft, IV

Enclosures:
As stated.

**No. 03-339**
**In The Supreme Court of the United States**

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JOSE FRANCISCO SOSA, PETITIONER
v.
HUMBERTO ALVAREZ-MACHAIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# BRIEF FOR THE UNITED STATES IN SUPPORT OF THE PETITION

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WILLIAM HOWARD TAFT, IV
Legal Adviser
Department of State
Washington, D.C. 20210

THEODORE B. OLSON
Solicitor General Counsel of Record
STUART E. SCHIFFER
Acting Assistant Attorney General
PAUL D. CLEMENT
EDWIN S. KNEEDLER
Deputy Solicitors General
GREGORY G. KATSAS
Deputy Assistant Attorney General
GREGORY G. GARRE
Assistant to the Solicitor General
DOUGLAS N. LETTER
BARBARA L. HERWIG ROBERT M. LOEB
Attorneys
Department of Justice
Washington, D.C. 20530-0001, (202) 514-2217

## QUESTIONS PRESENTED

The Alien Tort Statute (ATS), 28 U.S.C. 1350, provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The questions presented are:

1. Whether the ATS creates a private cause of action for aliens for torts committed anywhere in violation of the law of nations or treaties of the United States or, instead, is a jurisdiction-granting provision that does not establish private rights or action.

2. Whether, to the extent that the ATS is not merely jurisdictional in nature, the challenged arrest in this case is actionable under the ATS.

**[Table of Contents and Table of Authorities Omitted]**

**In The Supreme Court of the United States**

No. 03-339

JOSE FRANCISCO SOSA, PETITIONER
*v.*
HUMBERTO ALVAREZ-MACHAIN, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

# BRIEF FOR THE UNITED STATES IN SUPPORT OF THE PETITION

Pursuant to Rule 12.6 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully submits this response in support of the petition for certiorari in No. 03-339, seeking review of the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

[1] The Solicitor General has authorized the United States to file a separate petition for certiorari from the court of appeals' decision in this case, raising additional questions concerning respondent Alvarez-Machain's claims in this case against the United States. The United States' petition cannot raise the questions presented by petitioner Sosa because those issues arise from the judgment entered only against petitioner Sosa and not from the claims against the United States. On August 27, 2003, Justice O'Connor granted the United States' application for an extension of time within which to file such a petition to and including October 1, 2003.

## OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-108a) is reported at 331 F.3d 604. The initial panel opinion of the court of appeals (Pet. App. 109a-139a) is reported at 266 F.3d 1045. The March 18, 1999 (Pet. App. 176a-219a) and May 18, 1999 (Pet. App. 172a-175a) orders and the September 9, 1999 judgment (Pet. App. 140a-171a) of the district court are not yet reported.

## JURISDICTION

The judgment of the en banc court of appeals was entered on June 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In February 1985, DEA Special Agent Enrique Camarena-Salazar was abducted by members of a Mexican drug cartel and brought to a house in Guadalajara, Mexico, where he was tortured and murdered. Eyewitnesses placed respondent Humberto Alvarez-Machain, a Mexican citizen and a medical doctor, at the house while Camarena-Salazar was tortured. Pet. App. 4a.

In 1990, a federal grand jury indicted Alvarez-Machain for the torture and murder of Camarena-Salazar. The DEA attempted to obtain Alvarez-Machain's presence in the United States through informal negotiations with Mexican officials. *United States v. Alvarez-Machain*, 504 U.S. 655, 657 n.2 (1992). After those negotiations proved unsuccessful, DEA approved the use of Mexican nationals to take custody of Alvarez-Machain in Mexico and transport him to the United States. Thereafter, several Mexican nationals, including petitioner Sosa, acting at the behest of the DEA, seized plaintiff from his office

in Mexico, and in less than 24 hours transported him to the United States. Pet. App. 4a-5a.

Alvarez-Machain moved to dismiss the federal indictment against him, arguing that he could not be forced to stand trial in the United States on the ground that his seizure from Mexico was contrary to international law and a United States treaty with Mexico. This Court rejected that argument, holding that Alvarez-Machain's arrest "was not in violation of the Extradition Treaty," *Alvarez-Machain*, 504 U.S. at 670, and that, regardless of whether the arrest violated international law, he could be tried in this country "for violations of the criminal laws of the United States," *ibid.* The case was remanded for a trial, which took place in 1992. At the close of the government's case, the district court granted Alvarez-Machain's motion for acquittal. Pet. App. 6a.

2. In 1993, after returning to Mexico, Alvarez-Machain brought this civil action in the United States District Court for the Central District of California, asserting tort claims against the United States, federal DEA officials, petitioner Sosa, and certain unnamed Mexican civilians. The complaint sought, *inter alia*, to hold the United States liable for false arrest under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)(1), 2671-2680, and petitioner Sosa and the individual federal defendants liable under the Alien Tort Statute (ATS), 28 U.S.C. 1350. The district court substituted the United States for the individual federal defendants and dismissed Alvarez-Machain's FTCA claims against the United States. In addition, the court granted summary judgment for Alvarez-Machain on his ATS claims against petitioner Sosa, reasoning that recovery was available because, the court believed, Alva-

rez-Machain's arrest and detention violated international law. The court held that Alvarez-Machain could recover damages under the ATS only for his detention in Mexico and, after a trial, entered a $25,000 damages award against petitioner Sosa. Pet. App. 6a-7a.

3. Alvarez-Machain and petitioner Sosa filed separate appeals. In September 2001, the court of appeals affirmed in part and reversed in part. Pet. App. 109a-139a. Among other things, the court affirmed "the district court's judgment with respect to [petitioner] Sosa's liability under the [ATS]." *Id.* at 139a. In so holding, the court concluded that Alvarez-Machain's "detention was arbitrary and, therefore, violated the 'law of nations.'" *Id.* at 119a. In addition, the court reversed the district court's dismissal of Alvarez-Machain's FTCA claims against the United States and held that Alvarez-Machain could sue the United States for the tort of false arrest. *Id.* at 139a.

4. The court of appeals granted rehearing en banc, withdrew the initial panel's decision, and, by a 6-5 majority, issued a decision that reached the same result as the initial panel. Pet. App. 1a-108a. The court affirmed "the judgment with respect to [petitioner] Sosa's liability under the [ATS]" and "reverse[d] and remanded] the district court's dismissal of the FTCA claims against the United States." *Id.* at 64a.

a. In considering Alvarez-Machain's ATS claim, the en banc court reaffirmed the circuit's prior case law addressing "the scope of the [ATS]" and "delineat[ing] [its] contours." Pet. App. 9a-10a; see *id.* at 8a-14a. In particular, the en banc court explained, the Ninth Circuit has "resolved that the [ATS] not

only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations." *Id.* at 10a. Furthermore, drawing from the Ninth Circuit's prior case law, the court rejected as too "restrictive" petitioner's argument "that only violations of *jus cogens* norms, as distinguished from violations of customary international law, are sufficiently 'universal' and 'obligatory' to be actionable as violations of the law of nations' under the [ATS]." *Id.* at 11a.

Applying that understanding of the ATS, the en banc court held that an "arbitrary" extraterritorial arrest is an actionable violation of international law under the ATS. In finding that "there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention," the court pointed in particular to provisions of the Universal Declaration of Human Rights (Universal Declaration), G.A. Res. 217A, U.N. GAOR, 3d. Sess., U.N. Doc. A/810, at 71 (1948), the International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A, 21st Sess., U.N. Doc. A/6316 (1966), and to the Restatement (Third) of Foreign Relations. See Pet. App. 25a-26a & n.18. Furthermore, the court concluded that respondent's arrest was arbitrary, and thus an actionable violation of the law of nations under the Ninth Circuit's understanding of the ATS, because, the court held, the arrest was not authorized by United States or Mexican law. See *id.* at 29a-44a.

b. Judge O'Scannlain, joined by Judges Rymer, Kleinfeld, and Tallman, dissented. Pet. App. 72a-96a. Judge O'Scannlain found "astounding" the majority's decision "divin[ing] the entitlement to recovery from the [ATS]" based on the alleged violation of international law in this case. *Id.* at 73a. Although he as-

sumed that some violations of international law may be actionable under the ATS, Judge O'Scannlain concluded that "no claim can prevail where the United States, through its political branches, does not acquiesce in an international norm." *Id.* at 74a-75a; see *id.* at 80a. In Judge O'Scannlain's view, a "norm" of international law "to which the political branches of our government have refused to assent is not a universal norm [that is actionable under the ATS]" and "[i]t is not the judiciary's place to enforce such a norm contrary to their will." *Id.* at 81a.

Judge O'Scannlain concluded that Alvarez-Machain's claim for damages under the ATS for arbitrary arrest is not actionable under the ATS. As he explained, "[e]xamining the relevant statutes, the actions of the political branches in other circumstances, and * * * the manner in which the President and the Senate have exercised the treaty power in this area," there is "only one conclusion: The United States does not, as a matter of law, consider itself forbidden by the law of nations to engage in extraterritorial arrest, but reserves the right to use this practice when necessary to enforce its criminal laws." Pet. App. 86a-87a (footnote omitted). Regarding the claimed private right of action, Judge O'Scannlain observed that the ICCPR "was signed and ratified in 1992 but with the understanding by the Senate and Executive Branch that Articles 9 and 10 are not self-executing and may not be relied on by individuals" and the political branches have refused to recognize that the Universal Declaration creates "binding legal obligations." *Id.* at 87a n.12. Moreover, Judge O'Scannlain explained, "the DEA was well within its delegated powers [under domestic law] when arresting Alvarez." *Id.* at 92a.

In Judge O'Scannlain's view, "[t]he decision to exercise the option of transborder arrest as a tool of national security and federal law enforcement is for the political branches to make." Pet. App. 96a. As he explained, the political branches, "unlike the courts, may be held accountable for any whirlwind that they, and the nation, may reap because of their actions. By its judicial overreaching, the majority has needlessly shackled the efforts of our political branches in dealing with complex and sensitive issues of national security." *Ibid.* Moreover, Judge O'Scannlain observed, the majority's decision in, this case has important implications for the "international war on terrorism." *Id.* at 72a.

c. Judge Gould separately dissented. Pet. App. 97a-108a. In his view, "this case presents a nonjusticiable political question requiring scrutiny of an executive branch foreign policy decision." *Id.* at 97a. As he explained, "by holding that federal courts can review for compliance with international law executive branch decisions to act against foreign nationals on foreign soil, the majority transforms the executive branch's foreign policy decisions into occasions for judicial review." *Id.* at 104a. Moreover, Judge Gould emphasized, such judicial review "allows the fear of tort lawsuits to taint officials' already complicated foreign policy analysis" and "prevents our government from speaking with a single voice on an important foreign policy decision." *Id.* at 103a-104a.

## ARGUMENT

The Court should grant the petition and resolve the threshold questions presented concerning the proper scope and application of the ATS. Although the ATS was scarcely used throughout the first two hundred years of the Nation's history, ATS claims

have proliferated in the past few decades. With increasing frequency, and as exemplified by the divided en banc court of appeals' decision in this case, lower courts have struggled over the meaning and scope of the ATS. There is sharp disagreement over whether the ATS is merely a grant of jurisdiction or, instead, not only confers jurisdiction but also establishes a private right of action. That issue has profound separation-of-powers implications and serious consequences for both the development and expression of the Nation's foreign policy. Among courts that have concluded that the ATS creates a cause of action, there also is widespread disagreement over what types of international-law-based claims are actionable. The potential impact of this case on the actions of the Executive abroad is great and further heightened by the Nation's ongoing war against terrorism. Under the decision below, the ATS may serve as an instrument for litigants seeking judicial supervision of and monetary sanctions on the appropriateness of actions taken by this Nation and its allies in foreign lands.

This case also presents an important question concerning the authority of domestic law enforcement authorities to conduct arrests abroad. By holding that the statute authorizing arrests by DEA agents precludes agents from enforcing United States law extraterritorially—including those laws that by their very terms have extraterritorial effect—the en banc Ninth Circuit's decision in this case threatens the government's ability to conduct necessary law enforcement operations abroad in its efforts to combat international crime, and the flow of illegal drugs into the United States. The Solicitor General has therefore authorized the United States to file a separate petition for certiorari seeking review of the

judgment in this case, raising that issue. That petition is due October 1, 2003.

### A. The Questions Presented Are Exceptionally Important

The ATS states that "[t]he district courts shall have original, jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. 1350. The provision was enacted in 1789 as part of the first statute passed by Congress on the judiciary, Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76, and, although it has been amended in certain nonsubstantive respects, has remained largely unchanged for the past 215 years. For most of its history the ATS has existed as an obscure provision of the United States Code, a "legal Lohengrin," *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.), which was invoked only on a few occasions, and which became even less relevant after the enactment of general federal question jurisdiction in 1875. Act. of Mar. 3, 1875, ch. 137, § 1, 18 Stat. (Pt. 3) 470.

That changed in 1980. In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the first court of appeals' decision to expound on the ATS at length, the Second Circuit held that the ATS authorized a damages action brought in federal court involving a dispute between citizens of Paraguay regarding torture allegedly committed in Paraguay. As the Second Circuit itself has recently recognized, in the wake of the Filartiga decision, "[q]uestions surrounding the purpose and scope of the [ATS]" have "attract[ed] substantial judicial attention." *Flores v. Southern Peru Copper Corp.*, No. 029008, 2003 WL 22038598, at *6 (2d Cir. Sept. 2, 2003); see *id.* at *6-*10. As explained in Part B, *infra*, those questions have engendered

controversy in the lower courts. Indeed, in the past few decades, the ATS has been transformed by lower courts from a rarely invoked statutory provision into a prodigious font of litigation involving efforts by aliens to bring claims for alleged violations of their human rights in the United States courts, even with respect to events that are entirely extraterritorial, like the alleged violations in *Filartiga*.

In addition, as the court of appeals' decision in this case illustrates, some lower courts have inferred from the jurisdictional provision of the ATS a right of action on behalf of aliens to enforce in the United States courts not only alleged violations of self-executing treaties, but also violations of non-self-executing and unratified treaties, and even nonbinding resolutions of the United Nations General Assembly. That interpretation of the ATS has thrust the federal courts into an unprecedented role of defining what principles of customary international law are privately enforceable in the United States and effectively binding the United States to treaties or resolutions to which the Executive Branch has declined to accede. As Judge Randolph recently observed, "[t]o have federal courts discover [customary international law] among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers." *Al Odah v. United States*, 321 F.3d 1134, 1148 (D.C. Cir. 2003) (concurring opinion), petition for cert. pending, Nos. 03-334 & 03-343 (filed Sept. 2, 2003).

The use of the ATS by aliens to seek relief for violations of international law by foreign actors or others in foreign lands also has immediate foreign policy

consequences for the United States and its allies. Although ATS claims are often asserted against rogues or human-rights abusers, the claims are not limited to such defendants and may also be asserted against allies of our Nation. In this case, for example, respondent has asserted ATS claims against a foreign national who assisted the United States in the seizure abroad of an indicted criminal. When courts issue judgments in connection with such ATS litigation concerning the extent to which alleged acts do or do not violate the law of nations, they threaten the fundamental constitutional, principles that reserve to the political branches the authority to make judgments about how to conduct the Nation's foreign affairs and that seek to ensure that the Nation speaks with one voice on such matters. See *American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2386-2387 (2003); see also *Dames & Moore v. Regan*, 453 U.S. 654 (1981). Indeed, even the en banc court below observed that "international human rights litigation under the [ATS] inevitably raises issues implicating foreign relations." Pet. App. 18a; see note 9, *infra*.

The threshold question presented by petitioner Sosa is whether the ATS is a grant of subject matter jurisdiction or, instead, also creates a private cause of action. That issue is properly presented by this case. In an earlier appeal, petitioner Sosa argued that, although the ATS confers jurisdiction, it does not "create a substantive, federal right like the [Torture Victim Protection Act]." *Alvarez-Machain v. United States*, 107 F.3d 696, 703 (9th Cir. 1996), cert. denied, 522 U.S. 814 (1987). The Ninth Circuit rejected that argument and held that the ATS "has a substantive as well as jurisdictional component." *Ibid.* In addition, as noted above, in resolving the instant appeal, the en banc court specifically reaf-

firmed that the Ninth Circuit has "resolved that the [ATS] not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations." Pet. App. 10a. Furthermore, the question whether the ATS creates *any* private right of action is logically anterior to the question on which the en banc court divided below, *i.e.*, whether the alleged violation of international law in this case is actionable under the ATS.

This case therefore presents a timely and appropriate vehicle for this Court to provide vitally needed guidance on the scope of the ATS.

### B. The Lower Courts Are Divided Over The Scope Of The ATS

Nearly two decades ago, in the District of Columbia Circuit's fractured opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (1984), cert. denied, 470 U.S. 1003 (1985), Judge Edwards observed that this "area of law * * * cries out for clarification by the Supreme Court." *Id.* at 775 (concurring opinion). As the Second Circuit recounted in *Flores* just three weeks ago, after the petition here was filed, the controversy in the lower courts "regarding the meaning and scope of the [ATS]" has only deepened since *Tel-Oren*. *Flores*, 2003 WL 22038598, at *10. Indeed, the *Flores* court stressed that the disagreement over the meaning of the ATS raises "complex and controversial questions" that "can be resolved only by Congress or the Supreme Court." *Ibid.*[2]

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[2] This Court has not addressed the scope of the ATS. The underlying claim in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), was brought under the ATS, and the United States filed an amicus brief in support of the petitioner

a. As discussed, in *Filartiga*, the Second Circuit allowed an ATS action to proceed involving a dispute between citizens of Paraguay regarding torture allegedly committed in Paraguay. The Second Circuit has stated that, "[b]y allowing the plaintiffs' claim to proceed, the *Filartiga* Court not only held that the [ATS] provides a jurisdictional basis for suit, but also recognized the existence of a private right of action *for aliens only* seeking to remedy violations of customary international law or of a treaty of the United States." *Flores*, 2003 WL 22038598, at * 6; see *Kadic v. Karadzic*, 70 F.3d 232, 241-244 (2d Cir. 1995), cert. denied, 518 U.S. 1004 (1996); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 9293 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001).[3]

b. Four years after *Filartiga*, in *Tel-Oren*, the District of Columbia Circuit issued a fractured decision exploring the ATS. In *Tel-Oren*, the survivors and relatives of persons murdered and injured by a terrorist attack in Israel by the PLO brought ATS claims in the District Court for the District of Columbia. The court of appeals affirmed the dismissal of those claims, but each member of the panel stated "different reasons for affirming th[at] result." 726

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in *Hess*, which argued, *inter alia*, that "the Alien Tort Statute (like the federal question statute) is only jurisdictional in nature" and therefore "does not create a cause of action in favor of an alien for a violation of the law of nations." U.S. Br. 13 n.11. However, this Court decided *Hess* on the ground of foreign sovereign immunity and therefore did not consider the scope of the ATS. See 488 U.S. at 434-435.

[3] The *Filartiga* court did not specifically opine on whether the ATS itself created a private cause of action, but, as noted, the Second Circuit has recently stated, in reviewing its case law, that "*Filartiga* * * * recognized the existence of a private right of action." *Flores*, 2003 WL 22038598, at * 6.

F.2d at 775 (per curiam). Judge Bork concluded that the ATS is a purely jurisdictional statute and does not provide the plaintiffs a cause, of action or a substantive right to sue for violations of international law. *Id.* at 801-811. He further concluded that neither the treaties cited by plaintiffs in that case, nor international law by itself, conferred on plaintiffs a cause of action. *Id.* at 816. In addition, Judge Bork observed that "[w]hat little relevant historical background is now available to us indicates that those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations" and, Judge Bork stated, "[a] broad reading of section 1350 runs directly contrary to that desire." *Id.* at 812.

Judge Robb did not reach the question of whether the ATS is merely jurisdictional or instead creates a private cause of action. Rather, in his view, the proper resolution of the case lay in holding that the plaintiffs' ATS claims were "nonjusticiable" under "the political question doctrine." *Tel-Oren*, 726 F.2d at 823. In so holding, however, Judge Robb observed that the Second Circuit's decision in *Filartiga* is "fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure." *Id.* at 826 n.5. As he explained, the *Filartiga* court "failed to consider the possibility that *ad hoc* intervention by courts into international affairs may very well rebound to the decisive disadvantage of the nation. A plaintiff's individual victory, if it entails embarrassing disclosures of this country's approach to the control of the terror-

ist phenomenon, may in fact be the collective's defeat." *Ibid.*[4]

c. The Ninth Circuit was the next circuit to address the ATS. In *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (1992), cert. denied, 508 U.S. 972 (1993), the court of appeals held that a court in an ATS action may define and enforce the law of nations as part of its common law powers. See *id.* at 499-503. Three years later in *Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1474-1476 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995), that same court of appeals held that the ATS is not merely jurisdictional but instead also creates a cause of action to enforce the "law of nations." As discussed above, the Ninth Circuit reaffirmed that understanding of the ATS in its en banc decision in this case. See Pet. App. 10a.[5]

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[4] Judge Edwards agreed with the Second Circuit's decision in *Filartiga*, but concluded that a torture claim may only be asserted against a state actor. *Tel-Oren*, 726 F.2d at 775-798.

[5] The Ninth Circuit is currently considering en banc the panel's decision in *Doe I v. Unocal Corp.*, Nos. 00-56603 & 00-56628 (argued June 16, 2003). In that case, residents of Myanmar (Burma) brought an ATS action against a California corporation (Unocal) and the Myanmar military government. The plaintiffs alleged that they were subjected to forced labor, murder, rape, and torture in connection with the construction of a pipeline in Myanmar. The district court granted summary judgment for Unocal on the ATS claims, finding that plaintiffs could not show that Unocal acted under color of law or otherwise participated in abuses committed by the military government. 110 F. Supp. 2d 1294 (C.D. Cal. 2000). The Ninth Circuit reversed, holding that Unocal could be held liable under the ATS on the theory, which the panel derived from its assessment of customary international law, that Unocal aided and abetted the Myanmar military government in committing forced labor,

d. The Eleventh Circuit has joined the Second Circuit and the Ninth Circuit and has held that the ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir.), cert. denied, 519 U.S. 830 (1996).

e. More recently, in *Al Odah v. United States*, *supra*, the District of Columbia Circuit rejected ATS claims asserted against the United States by the next-friends of aliens detained at the U.S. Naval Base at Guantanamo Bay. The court of appeals unanimously held that, under *Johnson v. Eisentrager*, 339 U.S. 763 (1950), aliens outside the United States had no right to sue in United States courts regarding their detention under any jurisdictional theory. The *Al Odah* decision accordingly did not reach or address any issues concerning the nature of scope of the ATS. In a separate concurrence, however, Judge Randolph reiterated the position expressed by Judge Bork in *Tel-Oren*, that the ATS "does not create a cause of action," and the one by Judge Robb in *Tel-Oren*, "that Filartiga is 'fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure." *Al Odah*, 321 F.3d at 1146 (citing *Tel-*

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murder, and rape (but not torture). 2002 WL 31063976 (Sept. 18, 2002). The Ninth Circuit vacated the panel's decision and set the case for en banc consideration. 2003 WL 359787 (Feb. 14, 2003). The United States filed an amicus brief in support of Unocal in the en banc proceeding, arguing, *inter alia*, that the Ninth Circuit should revisit its ATS case law and hold that the ATS does not create a private right of action, but instead is merely jurisdictional. See Pet. App. 220a-249a. On May 9, 2003, the United States submitted a copy of its *Unocal* brief to the en banc court in this case.

*Oren*, 726 F.2d at 801 (Bork, J.); 726 F.2d at 826 n.5 (Robb, J.)).[6]

Judge Randolph reasoned that the ATS provides the courts with jurisdiction, but does not confer a cause of action. As he explained, under the United States Constitution, "Congress—not the Judiciary—is to determine, through legislation, what international law is and what violations of it ought to be cognizable in the courts." *Al Odah*, 321 F.3d at 1147. Moreover, Judge Randolph observed that, "[t]o hold that the [ATS] creates a cause of action for treaty violations, as the *Filartiga* decisions indicate, would be to grant aliens greater rights in the nation's courts than American citizens enjoy. Treaties do not generally create rights privately enforceable in the courts. Without authorizing legislation, individuals may sue for treaty violations only if the treaty is self-executing." *Id.* at 1146.

In *Flores*, after discussing the opinions in *Tel-Oren* and *Al Odah*, the Second Circuit stated that "the law of the District of Columbia Circuit stands in contrast to that of our Circuit and of the other Circuits that have followed our holding in *Filartiga*." 2003 WL 22038598, at *8. To be sure, no decision of the District of Columbia Circuit has commanded a single rationale for rejecting *Filartiga* (and the panel declined to reach the ATS issue in *Al Odah*). However, a majority of the court in *Tel-Oren* did reject *Filartiga* (albeit for different reasons). And, as the Sec-

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[6] Although Judges Garland and Williams did not join Judge Randolph's concurring opinion, "they d[id] not intend thereby to express any view about its reasoning." *Al Odah*, 321 F.3d at 1145 n*. Rather, they believed that the issues addressed by Judge Randolph did not need to be reached. *Ibid.*

ond Circuit recognized in *Flores*, the District of Columbia Circuit's case law "stands in contrast to" the expansive interpretation of the ATS that has been adopted by the circuits following *Filartiga*. Moreover, because many of the suits brought under the ATS involve wholly foreign activities without any nexus to a particular circuit, plaintiffs have substantial latitude in avoiding the District of Columbia Circuit and, in practice, have channeled ATS claims to circuits that have embraced *Filartiga*.

The importance of the questions presented concerning the ATS, and the fact that the case law discussed above substantially fleshes out the competing positions on the scope of the ATS that have been adopted by the lower courts, counsel against waiting for a more concrete circuit conflict to materialize, while plaintiffs continue to file ATS suits in the Second and Ninth Circuits that implicate potentially sensitive foreign affairs issues.

### C. The Ninth Circuit's Resolution Of Alvarez-Machain's ATS Claim Is Fundamentally Flawed

The en banc court's conclusion that Alvarez-Machain "has established a violation of the law of nations that is actionable under the [ATS]," Pet. App. 71a, is the product of several different legal errors, including, perhaps foremost, the en banc court's threshold determination that the ATS supplies anything more than a grant of jurisdiction. *Id.* at 10a.

1. The plain language, placement in the United States Code, and history of the ATS strongly suggest that the provision only establishes subject matter jurisdiction over a particular class of suits, and does not create a private right of action. By its terms, the

ATS vests federal courts with "original jurisdiction" over a particular type of action; it does not purport to *create* any private cause of action. An examination of the Judiciary Act of 1789 strongly supports that view. Sections 1 through 13 of the Act established the federal courts and delineated the jurisdiction of those courts. 1 Stat. 73-81. The ATS is set out in Section 9, adjacent to provisions establishing jurisdiction over crimes on the high seas, admiralty issues, and suits against consuls. See 1 Stat. 76. The ATS is thus naturally read, like those related provisions, as being solely a jurisdictional provision and, indeed, that is how it was viewed at the time of its creation. See Opinion on Fugitive Slaves (Dec. 3, 1792), in 6 *The Writings of Thomas Jefferson* 142 (Paul Leicester Ford, ed., 1895) (opinion of Sec'y of State Jefferson) (citing the "act of 1789, chapter 20, section 9" as a statute "describing the *jurisdiction of the Courts*") (emphasis added); see also *Montana-Dakota Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951) ("The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources").

That construction of the ATS is also consistent with what is known of its origins. Although there is no direct legislative history regarding the ATS, the available evidence indicates that Congress passed this jurisdictional provision, in part, against the background of two high profile incidents of the time concerning assaults on foreign ambassadors on domestic soil (*Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa. Oyer & Terminer 1784); *Report of Secretary for Foreign Affairs on Complaint of Minister of United Netherlands*, 34 J. Cont. Cong. 109, 111 (1788)). These two cases raised serious questions of

whether the then-new federal institutions would be adequate to avoid international incidents that could arise if such matters were left to the state courts. See William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 490-494 (1986).

The jurisdiction granted to the fledgling federal courts by Article III of the Constitution was not self-vesting. And Congress did not enact a general federal question statute until nearly 100 years later. The ATS, however, permitted the federal courts to hear one subset of "arising under" cases —*i.e.*, cases arising under Acts of Congress incorporating principles of the "law of nations" into the laws of the United States, under Acts of Congress executing treaties, or under "treaties of the United States." The Judiciary Act of 1789 thereby ensured that the federal courts would have jurisdiction over any claim brought by an ambassador, or other alien, seeking redress for a violation of such laws.

Furthermore, a year after passing the first Judiciary Act, Congress invoked its authority under Article I, Section 8, Clause 10 of the Constitution to define and punish violations of the "Law of Nations," and made assaults on ambassadors (as well as the two other traditional violations of the "law of nations" identified by Blackstone) statutory offenses under federal law. Act of Apr. 30, 1790, ch. 9, §§ 8-13, 25-28, 1 Stat. 113-115, 117-118; see 4 William Blackstone, *Commentaries on the Laws of England*, 68 (1769) ("The principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of am-

bassadors; and, 3. Piracy."). Thus, the origins of the ATS are consistent with an understanding that it grants the federal courts subject matter jurisdiction over only those claims brought to enforce the "law of nations" insofar as that law has been affirmatively incorporated into—*i.e.*, "animadverted on" by—the laws of the United States. The action of the First Congress, in adopting the three traditional concepts from the law of nations into the positive law of the United States, demonstrates that Congress knows how to do so when it wishes. In this case, there is no such Act of Congress defining the law of nations to include the alleged international "norms" on which Alvarez-Machain relied, much less creating a private right of action for a violation of such norms.

Under this understanding of the ATS, a plaintiff must show that Congress has enacted a cause of action to establish an actionable claim under the ATS, just as a plaintiff must point to an "unambiguously conferred right" (*Gonzaga Univ. v, Doe*, 536 U.S. 273, 283 (2002)) to maintain an action under 42 U.S.C. 1983. Such a cause of action would also fall within the present-day federal question jurisdiction (28 U.S.C. 1331). While this interpretation may appear to render the ATS superfluous today, it would not have been so in 1789, or even in 1979. General federal question jurisdiction was not enacted until nearly 100 years later, Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, and until 1980, that jurisdictional grant contained a minimum amount-in-controversy requirement, Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369. Until 1980 therefore, the ATS ensured that efforts to sue ambassadors, even if involving insubstantial monetary amounts, would be cognizable in federal court. The courts have recognized that the

elimination of the amount-in-controversy requirement in 1980 rendered numerous jurisdictional provisions superfluous. See, *e.g.*, *Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 520 (3d Cir. 1998); *Winstead v. J.C. Penney Co.*, 933 F.2d 576, 580 (7th Cir. 1991). In the case of the ATS, however, at the very time that Congress obviated the specific need for the little used ATS, the *Filartiga* court provided it with a fundamentally misconceived and problematic new role.

2. The Ninth Circuit's reading of the ATS as a broad. grant of implied rights of action not only does not square with the statute's text and history, it cannot be reconciled with this Court's repeated refusal in recent decisions to recognize implied private causes of action in the absence of a clear congressional intent to create such rights. See, *e.g.*, *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); *FDIC v. Meyer*, 510 U.S. 471, 483-486 (1994). Indeed, in *Sandoval*, this Court emphasized that it has "sworn off the habit of venturing beyond Congress's intent" when it comes to recognizing implied private rights. 532 U.S. at 287. And the renunciation of that "habit" of inferring private causes of action applies equally to newly minted as well as older statutes, such as the ATS. *Ibid.*

As this Court has admonished, in determining whether Congress has created a private cause of action, a court must focus on whether the statute at issue has 'rights-creating' language." *Sandoval*, 532 U.S. at 288. No 'rights-creating' language" is set forth in the ATS and, indeed, by its own terms, the ATS is a *jurisdiction*-vesting provision. Although it refers to a particular type of claim (*i.e.*, a "civil action by an alien for a tort only, committed in violation of

the law of nations or a treaty of the United States"), the ATS does not purport to create any particular statutory *rights*, much less rights that in turn could be interpreted to confer a private right of action for money damages.

The Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73, underscores that Congress knows how to create an express cause of action for the violation of international law when it wants to. That Act explicitly creates a private cause of action on behalf of both aliens and non-aliens who have suffered acts of torture at the hands of an individual acting under color of law of a foreign nation. See 28 U.S.C. 1350 note. The Act, moreover, carefully specifies the nature of actionable violations, legal standards, and statute of limitations governing the cause of action. Under the Ninth Circuit's construction of the ATS, the TVPA was entirely unnecessary for alien claimants.[7]

3. Even assuming that the ATS is not merely jurisdictional and creates a cause of action for some violations of international law, the Ninth Circuit in this case clearly erred in inferring a cause of action under the ATS for violation of non-binding interna-

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[7] To be sure, the House Report on the TVPA states that the ATS "should remain intact to permit suits based on other norms that already exist or may ripen in the future into the rules of customary international law." H.R. Rep. No. 367, 102d Cong., 1st Sess., Pt. 1, at 4 (1991); see S. Rep. No. 244, 102d Cong., 1st Sess., at 4-5 (1991). But a statement in a committee report is not a law. Moreover, whatever weight a court may give such legislative history in the context of interpreting the statute accompanying the report *i.e.*, the TVPA, it is entitled to little if any weight in interpreting a statute, like the ATS, enacted by a *prior* Congress.

tional agreements that indisputably were not intended by the President or Congress to create rights capable of domestic enforcement through legal actions by private parties.

a. The Ninth Circuit has an established practice of inferring rights of action to enforce rights based on international agreements that the United States has refused to join, non-binding agreements, and agreements that are not self-executing, as well as political resolutions of United Nations bodies and other non-binding statements. See, *e.g.*, Pet. App. 25a-26a; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-716 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383-1384 (9th Cir. 1998). In this case, for example, the court found an actionable violation of international law under the ATS based on provisions of the Universal Declaration, *supra*, a non-binding resolution of the General Assembly of the United Nations; the American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673, to which the Senate *refused* to give its consent; and the ICCPR, *supra*, a non-self-executing treaty. See *Flores*, 2003 WL 22038598, at *25 n.35; *Al Odah*, 321 F.3d at 1147 (Randolph, J., concurring). In ratifying the ICCPR (as well as other human rights treaties), the Senate and the Executive Branch expressly agreed that the ICCPR would not be self-executing so it could not be relied on by individuals in domestic court proceedings. See S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 9, 19, 23 (1992); 138 Cong. Rec. 8068, 8070-8071 (1992). Other courts of appeals uniformly have recognized that the ICCPR is neither self-executing nor

enforceable through jurisdiction granting provisions such as the habeas corpus statute.[8]

If the political branches of the United States refuse to ratify a treaty, or regard a United Nations resolution as nonbinding, or declare a treaty not to be self-executing, there is no basis for a court to infer a cause of action to enforce the norms embodied in those materials. See *Al Odah*, 321 F.3d at 1148 (Randolph, J., concurring). The Second Circuit recently rejected the Ninth Circuit's practice of looking to such documents to discern the "law of nations" in an ATS case. See *Flores*, 2003 WL 22038598, at *19-*20. Judge Cabranes explained that non-binding General Assembly declarations "are not proper sources of customary international law because they are merely aspirational and were never intended to be binding on member States of the United Nations:" *Id.* at *19. More fundamentally, as Judge Randolph explained in *Al Odah*, looking to an unratified treaty or human rights agreement to establish rules of law "is anti-democratic and at odds with principles of separation of powers." 321 F.3d at 1148 (concurring).

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[8] See *Flores*, 2003 WL 22038598, at *25 n.35 (citing cases); *Buell v. Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001); *United States ex rel. Perez v. Warden*, 286 F.3d 1059, 1063 (8th Cir.), cert. denied, 537 U.S. 869 (2002); *Beazley v. Johnson*, 242 F.3d 248, 267-268 (5th Cir.), cert. denied, 534 U.S. 945 (2001); *Igartua De La Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (per curiam), cert. denied, 514 U.S. 1049 (1995); see also *Al Odah*, 321 F.3d at 1147 (Randolph, J., concurring). In addition to the ICCPR, the Senate either expressly conditioned its consent or clearly understood that the Convention on the Elimination of All Forms of Racial Discrimination, the Torture Convention, and the Genocide Convention would not be self-executing. See 140 Cong. Rec. 14,326 (1994); 136 Cong. Rec. 36,198 (1990); 132 Cong. Rec. 2350 (1986).

Similarly, when a treaty is ratified but is not self-executing (as the President and Senate have characterized modern human rights treaties), the treaty neither creates a cause of action nor provides rules that a court may properly enforce in a legal action brought by a private party even when jurisdiction exists. As this Court has held, a non-self-executing treaty "addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court." *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (Marshall, C.J.), overruled on other grounds, *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). The untenable result of the Ninth Circuit's approach is to transform non-binding, non-self-executing documents—materials that are not even the result of the very constitutionally proscribed legislative process that has produced statutes from which this Court has *refused* to infer a private right of action, see, *e.g.*, *Gonzaga Univ.*, 536 U.S. at 283 (emphasizing that a federal statute must contain an "unambiguously conferred right" for suit to lie under 42 U.S.C. 1983)—into virtually boundless sources of private rights actionable under the ATS.

Moreover, as Judge Randolph observed, permitting courts to recognize such private rights of action under the ATS not only contradicts this Court's sworn refusal to infer private rights from duly enacted statutes that do not specifically grant such rights, but it creates another anomaly—it would "grant aliens greater rights in the nation's courts than American citizens enjoy," since by its terms the ATS applies only to suits brought by aliens. *Al Odah*, 321 F.3d at 1146 (concurring). There is no basis whatever to conclude that the Congress that enacted the ATS—only a few years removed from the war

that secured the Nation's independence—intended to create such a counter-intuitive regime.

b. To be sure, in certain areas, courts, in connection with matters already validly pending before them, have looked to norms of international law to furnish a rule of decision. See, *e.g.*, *The Paquete Habana*, 175 U.S. 677, 700 (1900). That practice, however, is fundamentally different from a court inferring a cause of action as an initial matter based on international law. As the District of Columbia Circuit has recognized, international law does not generally provide causes of action enforceable in federal court. See *Tel-Oren*, 726 F.2d at 780 n.4 ("the law of nations consciously leaves the provision of rights of action up to the states") (Edwards, J., concurring); *id* at 810 (Bork, J., concurring). But even where a court may properly look to international law norms, it does so only *in the absence* of a "controlling executive or legislative act." *The Paquete Habana*, 175 U.S. at 700. A ratified treaty accompanied by an express declaration that it is not self-executing is plainly such a controlling act. Similarly, the existence of a treaty or convention that has been ratified by some nations and even signed by the United States (but not yet ratified) falls in the same category, because the political branches have taken the matter fully in hand, but not yet taken the necessary steps to make the treaty binding on the United States; the treaty therefore cannot properly be relied on in our courts as a source of the law of nations. And United Nations General Assembly resolutions are (with narrow exceptions) not binding on the member nations, and require further action by the member states before they may create any enforceable rights. See Georg Schwarzenberger & E.D. Brown, *A Manual of International Law* 233 (1976). The actions or inactions of

the political branches with respect to those instruments thus implicate the political question doctrine in that the actions of the political branches must be deemed dispositive as to what effect they have on the law of nations to be applied within the United States. See Pet. App. 97a.

4. Other considerations also compel against inferring a cause of action under the ATS (or creating common law causes of action to enforce international law norms) when the political branches have not done so. In other contexts, courts refuse to infer causes of action where they implicate matters that by their nature should be left to the political branches. See *FDIC v. Meyer*, 510 U.S. at 486. Few matters are more directly committed to the political branches than the management of the Nation's foreign affairs. See *Garamendi*, 123 S. Ct. at 2386; *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319, 320 (1936). Indeed, the Constitution expressly gives the Congress, and not the courts, the power to "define and punish * * * Offenses against the Law of Nations." U.S. Const. Art. I, § 8, Cl. 10. Permitting courts to imply causes of action under the ATS from the unbounded reaches of customary international law directly infringes on the textually grounded constitutional responsibility of the political branches to exercise their judgment in setting appropriate limits on the enforceability or scope of treaties and other international legal principles. Cf. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (judicial interference is particularly unwarranted when matter is textually committed to another branch); see also Pet. App. 98a-99a.

So too, under the expansive interpretation adopted by the Ninth Circuit, ATS litigation is

fraught with foreign policy implications and the potential for interferehce with the exercise of constitutional responsibilities by the political branches. Under that theory, ATS actions would often involve the judiciary in deciding suits between foreigners regarding events that occurred within the borders of other nations, and in the exercise of foreign governmental authority. The ATS cannot properly be construed to permit suits requiring United States courts to pass factual and legal judgment on these foreign acts.[9]

Moreover, under plaintiffs' approach, ATS actions are not limited to suits against rogues and outlaws. Such claims can easily be asserted against this Nation's allies, including those supporting this Nation's fight against terrorism. In this case, for example, the court has permitted an alien to sue foreign nationals who assisted the United States in its conduct of international law enforcement efforts. The court of appeals' expansive interpretation of the ATS thus places the judiciary in the wholly unfamiliar and constitutionally inappropriate role of second-

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[9] Recently, for example, the South African government responded to ATS litigation seeking reparations for human rights abuses during the apartheid regime. A September 10, 2003 press release issued by the South African Government stated: "I wish to confirm that the South African Government is of the view that the litigation should be halted. It is of this view because it believes that the issues of reparations is an issue which affects South Africians and should be dealt with by South Africians, if necessary, in South African courts * * * . We do not believe that the goodwill which exists in South Africa and the partnerships which have developed to deal with the past should be jeopardised by the litigation in New York." Ltr. from Minister Penuell M. Maduna to Judge John E. Sprizzo, Exh. 1 (Sept. 11, 2003) (on file in *In re South African Apartheid Litig.*, MDL No. 1499 (S.D.N.Y. filed Sept. 11, 2003)).

guessing political decisions regarding how the United States should respond to conduct in foreign lands or carry out international law enforcement. The profound risks threatened by such a regime are alone a sufficient ground to grant certiorari.

5. Even if the ATS could support inference of a cause of action in some instances, the court of appeals erred in inferring that it applies extraterritorially as well. Absent reason to conclude otherwise, statutes are generally presumed to apply only within the territory of the United States, or, in limited circumstances, on the high seas. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-285 (1949). Nothing in the ATS, or in its contemporaneous history, suggests that Congress intended it to apply to conduct in foreign lands. To the contrary, the ambassador assaults that preceded the ATS, see p. 17, *supra*, and the only reported cases in which courts mentioned the ATS soon after its enactment involved *domestic* incidents—the capture of a foreign ship in U.S. territorial waters and seizure of slaves on a ship at a U.S. port. See *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895); *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607). Moreover, Attorney General Bradford, while noting the availability of ATS jurisdiction for certain offenses on the high seas in 1795, also explained that insofar "as the transactions complained of originated or took place in a *foreign country*, they are not within the cognizance of our courts." See 1 Op. Att'y Gen. 57, 58 (1795) (emphasis added).

It also bears emphasis that, as discussed above, the ATS is only a jurisdiction-vesting statute, which itself does not apply extraterritorially. Properly un-

derstood, a cause of action for extraterritorial actions would depend on a statute that both creates a cause of action and makes sufficiently clear that it applies extraterritorially. Here, of course, the Ninth Circuit inferred a cause of action in the absence of a statutory cause of action, and even many of the materials it relied on, such as the ICCPR, do not impose extraterritorial commitments. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (the typical presumption against extraterritorial application "has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility").

As discussed above, the ATS was enacted to *avoid* strife with other countries. That objective does not support expanding the ATS to encompass claims arising in other nations. Other nations did not in 1789 (and certainly do not today) expect our courts to provide civil remedies for disputes between their own citizens (or involving third-country nationals) that occur on their own soil. To the contrary, litigating such disputes in this country can itself lead to objections from the foreign nations where the alleged injury occurred. That construction, moreover, would open the door to claims that U.S. activities abroad violate international law, which, if allowed under the ATS, would put courts in the role of arbitrating the exercise of the foreign affairs power that the Constitution textually commits to the political branches. That is all the more reason to doubt that the first Congress ever imagined that the ATS would be construed to open the United States courts to the sort of potentially divisive ATS litigation that has proliferated in the United States courts in the 23 years since the Second Circuit decided *Filartiga*.

### D. The Ninth Circuit Erred In Holding That Alvarez Machain's Arrest Was Not Authorized By United States Law

The en banc court's ruling against petitioner Sosa is also predicated on its holding that the arrest was not authorized under United States law. Pet. App. 44a. Notwithstanding its expansive interpretation of the ATS, even the en banc court recognized that there could be no liability under the ATS for "arbitrary" arrest and detention if the arrest and detention were taken pursuant to United States law. *Id.* at 29a. As the United States will explain in detail in its own petition for certiorari in this case, see note 1, *supra*, Alvarez-Machain was properly indicted and arrested under federal statute. The ATS claim brought against petitioner Sosa fails for that reason as well.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
*Solicitor General*
STUART E. SCHIFFER
*Acting Assistant Attorney General*
PAUL D. CLEMENT
EDWIN S. KNEEDLER
*Deputy Solicitors General*
GREGORY G. KATSAS
*Deputy Assistant Attorney General*
GREGORY G. GARRE

*Assistant To The Solicitor General*
DOUGLAS N. LETTER
BARBARA L. HERWIG
ROBERT M. LOEB
*Attorneys*

WILLIAM HOWARD TAFT, IV
*Legal Adviser*
*Department of State*

SEPTEMBER 2003

## APPENDIX E

05-2141-cv
05-2326-cv

**United States Court of Appeals**
**FOR THE SECOND CIRCUIT**

SAKWE BALINTULO KHULUMANI, as personal representative of Saba Balintulo, FANEKAYA DABULA, as personal representative of Lungile Dabula, NOKITSIKAYE VIOLET DAKUSE, as personal representative of Tozi Skweyiya, BERLINA DUDA, as personal representative of Donald Duda, MARK FRANSCH, as personal representative of Anton Fransch, SHERIF MZWANDILE GEKISO, as personal representative of Ntombizodwa Annestina Nyongwana, ELSI GUGA, as personal representative of James Guga, JOYCE HLOPHE, as personal representative of Jeffrey Hlophe, NOMVULA EUNICE KAMA, as personal representative of Mncedisi Dlokova, JOYCE LEDWABA, as personal representative of Samuel Ledwaba,

*(see inside cover for continued list of parties)*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF *AMICUS CURIAE* REPUBLIC OF SOUTH AFRICA**
**IN SUPPORT OF AFFIRMANCE**

DAVID B. GOLDSTEIN RABINOWITZ, BOUDIN, STANDARD, KRINKSY & LIEBERMAN, P.C.
111 Broadway, 11th Floor
New York, New York 10006
(212) 254-1111
*Attorneys for Amicus Curiae*

JOHANA LERUTLA, as personal representative of Matthews Lerutla, FRIEDA Z. LUKHULEI, as personal representative of Tokkie Lukhulei, ELIZABETH MAAKE, as personal representative of Jackson Maake, ARCHINTON MADONDO, as personal representative of Mandla Madondo, BENJAMIN MAIFADI, TSHEMI MAKEDAMA, as personal representative of Lugile Makedama, MABEL MAKUPE, as personal representative of Andrew Makupe, MABEL MALOBOLA, as personal representative of Malobola Mbuso, EVELYN MATISO, as personal representative of Pitsi Matiso, BETTY MGIDI, as personal representative of Jeffrey Mgidi, ELIZABETH MKHONWANA, as personal representative of Obed Mkhonwana, CATHERINE MLANGENI, as personal representative of Bheki Mlangeni, CECIL MLANJENI, as personal representative of Kele Mlanjeni, SAMUEL MORUDU, as personal representative of Sannah P. Leslie, TSHIDISO MOTASI, as personal representative of John and Penelope Moloke, WILLIE NELANI, as personal representative of Mongezi Nelani, CATHERINE NGQULUNGA, as personal representative of Brian Ngqulunga, CATHERINE PHIRI, as personal representative of Thomas Phiri, ELIZABETH SEFOLO, as personal representative of Harold Sefolo, MARIA SIBAYA, as personal representative of Jeffrey Sibaya, PATRICIAL M. SONGO, as personal representative of Dipulo Songo, MPOLONTSI TYOTE, as personal representative of Boyboy Tyote, NOMKHANGO SKOLWENI DYANTYI, CLIFFORD ZIXELILE FUDUKILE, WINDOVOEL GAAJE, CHARLES HLATSHWAYO, MOSES HLONGWANE, LESIBA KEKANA, SANAKI MAHLATSHI, ROBERT MAKANA, ZAKHARIA FIKILE MAMBA, ELLIOT SITHEMBISO MARENENE, AL-

FRED MASEMOLA, MAUREEN THANDI MAZIBUKO, MICHAEL MBELE, LAETITIA NOMBAMBO MFECANE, as personal representative of Rubin Mfecane, DENNIS MLANDELI, TEFO MOFOKENG, MOTLALETSATSI MOLATEDI, AZARIEL MOLEBELELI, SIMON MOLOTSI, LINA MOREANE, as personal representative of Albert Xaba, THABISO SAMUEL MOTSIE, SONTO NDLOVU, MANGINDIVA ROBERT RHENENE, THOBILE SIKANI, BUBELE STEFAN, NOLUTHANDO BILETILE, LESLIE MNCEDISI BOTYA, LEON DUKASCHE, ELSIE GISHI, DORTHIA GOMO-PEFILE, ZAMIKHAYA BISHOP KHALI, JAMES MAGABANA, NOSIPHO MANQUBA, NOTATHU EUGENIA MATOMELA, NOMISA THERSIA MAY, MBONGENI NELSON MBESHU, MZUHLANGENA NAMA, ELIAS NGAMANI, as personal representative of Elizabeth Nagamani, GESHIA NGOXZA, LUCAS NDUKWANIBUZWA NGWENYANA, WELLINTON MTYUKATO NKOSIPHENDULE, VUYANI NONGCAMA, SINDISWA MIRRIAM NUNU, THULANI NUNU, BONIWE PHALAZA, PATHISWA PRINGANE, As personal representative of Mthozama Theophilus Pringane, MTHUTUZELI SIKANI, NOLUTHANDO SILETILE, THEMBEKA VICTORIA SIPHAHO, JOHANNES TITUS, MPOLONTSI TYOTES, MTHUZIMELE MELFORD YAMILE, NTUNANI WILLIAM ZENANI, THANDIWE SHEZI, ELIAS B. BONENG, DENNIS VINCENT FREDERICK BRUTUS, MORALOKI A. KGOBE, REUBEN MPHELA, LULAMILE RALRALA,

*Plaintiffs-Appellants (05-2141),*

—against—

BARCLAY NATIONAL BANK LTD., BRITISH PETROLEUM, PLC., CHEVRONTEXACO CORPORATION, CHEVRONTEXACO GLOBAL ENERGY, INC., CITIGROUP, INC., COMMERZBANK, CREDIT SUISSE GROUP, DAIMLERCHRYSLER AG, DEUTSCHE BANK AG, DRESDNER BANK AG, EXXONMOBIL CORPORATION, FORD MOTOR COMPANY, FUJITSU, LTD., GENERAL MOTORS CORPORATIONS, INTERNATIONAL BUSINESS MACHINES CORP., J.P. MORGAN CHASE, SHELL OIL COMPANY and UBS AG,

*Defendants-Appellees (05-2141),*

AEG DAIMLER-BENZ INDUSTRIE, FLUOR CORPORATION, RHEINMETALL GROUP AG, RIO TINTO GROUP, TOTAL-FINA-ELF and DOE CORPORATIONS,

*Defendants (05-2141).*

LUNGISILE NTZEBESA, HERMINA DIGWAMAJE, ANDILE MFINGWANA, F.J. DLEVU, LWAZI PUMELELA KUBUKELI, FRANK BROWN, SYLVIA BROWN, NYAMEKA GONIWE, SIGQIBO MPENDULO, DOROTY MOLEFI, THEMBA MEQUBELA, LOBISA IRENE DIGWAMAJE, KAELO DIGWAMAJE, LINDIWE PETUNIA LEINANA, MATSHIDISO SYLVIA LEINANA, KELEBOGILE PRUDENCE LEINANA, DAVID MOTSUMI, SARAH NKADIMENG, MOEKETSI THEJANE, MOSHOESHOE THEJANE, PASCALINAH BOOKIE PHOOFOLO, KHOBOTLE PHOOFOLO, GLADYS MOKGORO, JONGANI HUTCHINGSON, SEFUBA SIDZUMO, GOBUSAMANG LAURENCE LEBOTSO, EDWARD THAPELO TSHIMAKO, RAHABA MOKGOTHU, JONATHAN MAKHUDU LE-

DIGA, ANNA LEBESE, SIPHO STANLEY LEBESE, WILLIAM NBOBENI, JOHN LUCAS NGOBENI, CLEMENT HLONGWANE and MASEGALE MONNAPULA,

*Plaintiffs-Appellants (05-2326),*

SAKWE BALINTULO KHULUMANI, P.J. OLAYI, WELLINGTON BANINZI GAMAGU,

Violations of Pass Laws, Unlawful Detention 1981-1983, Torture Subjected to Discriminatory Labor Practices 1981 and WILLIAM H. DURHAM,

*Plaintiffs (05-2326),*

—against—

DAIMLER CHRYSLER CORPORATION, NATIONAL WESTMINSTER BANK PLC, COLGATE PALMOLIVE, BARCLAYS BANK PLC, UBS AG, CITIGROUP INC.,

DEUTSCHE BANK AG, DRESDNER BANK AG, COMMERZBANK AG, FORD MOTOR COMPANY, HOLCIM, INC., EXXON MOBIL CORPORATION, SHELL OIL COMPANY, J.P. MORGAN, MINNESOTA MINING AND MANUFACTURING CO. (3M Co.), GENERAL ELECTRIC COMPANY, BRISTOL-MEYERS SQUIBB CO., E.I.DUPONT DE NEMOURS, XEROX CORPORATION, IBM, GENERAL MOTORS, HONEYWELL INTERNATIONAL INC., BANK OF AMERICA, N.A., THE DOW CHEMICAL COMPANY, COCA-COLA CO., CREDIT AGRICOLE S.A., HEWLETT-PACKARD COMPANY, EMS-CHEMIE (NORTH AMERICA) INC., CHEVRON TEXACO CORPORATION, AMERICAN ISUZU MOTORS, INC. and NESTLE USA, INC.,

*Defendants-Appellees (05-2326),*

SULZER AG, SCHINDLER HOLDING AG, ANGLO-AMERICAN CORPORATION, DEBEERS CORPORATION, NOVARTIS AG, BANQUE INDO SUEZ,

CREDIT LYONNAIS, and Unknown Officers and Directors of DANU INTERNATIONAL, STANDARD CHARTERED, P.L.C., CORPORATE DOES, CREDIT SUISSE GROUP, CITIGROUP AG, SECURITIES INC., as Successor to Morgan Guaranty, MANUFACTURERS HANNOVER, CHEMICAL BANK & CHASE MANHATTAN BANK, UNISYS CORPORATION, SPERRY CORPORATION, BURROUGHS CORPORATION, ICL, LTD., AMDAHL CORP., COMPUTER COMPANIES, JOHN DOE CORPORATION, HOLCIN, LTD., HENRY BLODGET, JUSTIN BALDAUF, KRISTEN CAMPBELL, VIRGINIA SYER GENEREUX, SOFIA GHACHEM, THOMAS MAZZUCCO, EDWARD MCCABE, DEEPAK RAJ, JOHN 1-10 DOE, OERLIKON CONTRAVES AG, OERLIKON BUHRLE AG, CORPORATE DOES 1-100, ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT & TRADING COMPANY PLC and SHELL PETROLEUM, INC., MERRILL LYNCH & CO. INC., KENNETH SEYMOUR,

*Defendants (05-2326).*

**[Table of Contents and Table of Authorities Omitted]**

## INTEREST OF AMICUS CURIAE

*Amicus Curiae*, the Republic of South Africa, is a sovereign, democratic State founded on the following fundamental principles: human dignity and respect for human rights, equality, non-racialism, non-sexism, the supremacy of the Constitution (1996), the rule of law through an independent judiciary, universal adult suffrage, and a multi-party electoral system of democratic government designed to ensure accountability, responsiveness and openness. A democratic government was first elected in 1994 after the dismantling of apartheid. This government was elected largely "by the previously apartheid-excluded majority on a programme specifically to redress the legacy of apartheid." Declaration of then Minister of Justice and Constitutional Development of the Republic of South Africa, Penuell Mpapa Maduna,¶ 4 (dated July 11, 2003, filed July 23, 2003) ("Maduna Decl.") (reproduced in the Joint Appendix at A00797-A00806); *see* United States Statement of Interest, filed in the district court (recognizing that the present government "is broadly representative of the victims of the apartheid regime and [we] believe that this government is uniquely charged with a popular mandate to deal with the legacy of apartheid") (A01090).

The Republic of South Africa is vitally and necessarily interested in the outcome of these consolidated litigations. These foreign litigations fundamentally interfere with South Africa's independence and sovereignty and intervene in its internal affairs, including its right under international law to address its apartheid past and to develop policies for its future in the manner it deems most appropriate, subject to the support and approval of the democratic elector-

ate. It is the South African Government, not a foreign court, that is responsible for these matters, particularly the future well-being of the nation, and that must answer to the people for its policies. While opposing the use of foreign courts to address these issues, the current government has forthrightly acknowledged that it "bears primary responsibility for the rehabilitation and improvement of the lives of the people whom the [plaintiffs] claim to represent." Maduna Decl. ¶ 6 (A00802).

The Republic of South Africa has officially advised the district court of its position that these litigations should be dismissed. *See* Maduna Declaration (A00797-A00806; *see also* A01066-68). This position has also been set out in public statements, including in a speech by President Thabo Mbeki to the Parliament and the Nation on April 15, 2003 (A00740, A00747). The Republic of South Africa reiterates its position in the annexed Statement of Brigitte Sylvia Mabandla, Minister of Justice and Constitutional Development, On Behalf of the Republic of South Africa, dated October 13, 2005. This Statement includes in full the Declaration of former Minister Maduna.

## ARGUMENT

These official statements of the Republic of South Africa explain how these litigations interfere with its independence and sovereignty, including its sovereign right to determine, according to its internal political and constitutional order, how best to address apartheid's legacy.

South Africa takes note of the suggestion by the United States Supreme Court of the application of "case-specific deference" to these cases. *Sosa v. Alva-*

*rez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, 2766 n.21 (2004).[1]

In the context of the Government's fundamental commitment to broad programs of reconstruction and transformation, as discussed in the Maduna Declaration, South Africa has chosen a policy of promoting economic growth, including by encouraging business investment, both foreign and domestic, rather than demanding reparations or seeking punishment from corporations that may have profited from or cooperated with the apartheid regime. Further, it is the Government's view that these litigations may disrupt the growth of the South African economy "by deterring foreign direct investment and undermining economic stability." Maduna Decl. ¶ 12. With due respect, these are decisions for the sovereign, democratic Republic of South Africa, not foreign courts.

All parties have consented to the filing of this *amicus curiae* brief.

## CONCLUSION

For the reasons stated herein and in the Annexed Statement of Minister Mabandla and in the Maduna Declaration, in addition to the reasons addressed by

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[1] In this extraordinary footnote in an unrelated case, the Supreme Court specifically identified these litigations as possible candidates for "a policy of case-specific deference to the political branches," quoted from the Maduna Declaration's statement that these litigations interfere with South Africa's policies for addressing apartheid's legacy, noted that "[t]he United States has agreed," and advised, "In such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy," citing *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240, 2255-2256 (2004).

the district court, the decision of the district court dismissing these consolidated litigations should be affirmed.

October 14, 2005

/s/ _____
Respectfully Submitted,
David B. Goldstein
Thomas C. Viles
RABINOWITZ, BOUDIN, STANDARD, KRINKSY & LIEBERMAN, P.C.
111 Broadway -- 11th Floor
New York, New York 10006
(212) 254-1111

*Attorneys for Amicus Curiae Republic of South Africa*

Certificate of Compliance

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 800 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of limitations of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14-point, Times New Roman.

I certify that this information is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

October 14, 2005

/s/
David B. Goldstein
Counsel for *Amicus Curiae*

ANNEX

**STATEMENT OF BRIGITTE SYLVIA MABANDLA, MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, ON BEHALF OF THE REPUBLIC OF SOUTH AFRICA, CONCERNING THE APARTHEID-RELATED LITIGATIONS IN THE UNITED STATES COURTS**

1. I am the Minister of Justice and Constitutional Development of the Republic of South Africa and a member of the Cabinet of President Thabo Mbeki, the President of the Republic of South Africa ("the President").

2. I make this statement to set forth the current policy of the Government of the Republic South Africa ("the Government") towards the above proceedings.

3. The development and implementation of national policy is a matter of collective Cabinet responsibility. Dr Penuell Mpapa Maduna ("Dr Maduna"), who was a member of the Cabinet at the time his Declaration was filed, was specifically authorised to do so on behalf of the Government then, as I am now. Submissions to the contrary by parties to these proceedings are incorrect.

4. In the South African government's view, the issues raised in these proceedings are essentially political in nature. They should be and are being resolved through South Africa's own democratic processes. We submit, with respect, that another country's courts should not determine how ongoing political processes in South Africa should be resolved.

**THE GOVERNMENT'S ATTITUDE TOWARDS THE LITIGATION**

5. The previous Minister of Justice and Constitutional Development, Dr. Maduna deposed to a declaration, upon instructions of the Cabinet, which was filed in this matter before the District Court.

6. Dr. Maduna made the declaration on behalf of the Government of the Republic of South Africa.

7. I am able to confirm that the Government's position on the issue has been consistent and has not changed at all.

8. I have read Dr. Maduna's declaration and confirm that it correctly reflects the current policy of the Government towards all the actions on appeal from the District Court.

9. In his declaration, Dr Maduna stated and I quote in full:

**DECLARATION BY PENUELL MPAPA MADUNA**

1. I am the Minister of Justice and Constitutional Development of the Republic of South Africa and a member of the cabinet of President Thabo Mbeki. I am an admitted attorney of the High Court of South Africa and hold the degrees of B.Juris, LL.B, LL.M as well as a Ph.D in constitutional law.

2. I make this declaration to set forth the South African government's ("the government") view of various cases pending in the United States courts against corporations that did business with and in South Africa during the apartheid period, including those cases consolidated under the caption, *In Re South African Apartheid Litigation*, MDL No. 1499 (S.D.N.Y.) and *In Re Khulumani & others*, CV 02

5952 (E.D.N.Y.) It is the government's submission that as these proceedings interfere with a foreign sovereign's efforts to address matters in which it has the predominant interest, such proceedings should be dismissed.

3.

3.1 By way of background, the Republic of South Africa is one sovereign democratic state founded on the values of human dignity, equality, non-racialism, non-sexism, supremacy of the Constitution, and the rule of law, universal adult suffrage and a multi-party system of democratic government to ensure accountability, responsiveness and openness. Under South Africa's 1996 Constitution, the Constitution is the supreme law of the Republic. Under the Constitution, the judicial authority of the Republic is vested in the courts, which are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. No person or organ of state may interfere with the functioning of the courts, while all other organs of the state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. An order or decision of a court binds all persons to whom and organs of state to which it applies. South Africa has a well developed judicial system, with the Constitutional Court at its apex and the Supreme Court of Appeal as the final court of appeal in non-constitutional matters. Judgments of the Constitutional Court and, indeed, the Supreme Court of Appeal, are widely admired for their independence and incisiveness and are frequently referred to in judgments of other final courts of appeal internationally.

3.2

3.2.1 The 1993 interim Constitution, which paved the way for South Africa's first democratic government in 1994, made provision for the establishment of a Truth and Reconciliation Commission ("the TRC") in order to establish the truth in relation to "past events", the circumstances under which gross violations of human rights occurred and to make such findings known. The purpose of the TRC was not simply to provide an account of the apartheid system, but to document gross violations of all human rights abuses, irrespective of their perpetrators, and to make provision for amnesty for those who made full disclosure of such politically-motivated human rights violations and to provide reparations for the victims of such abuses. In 1995, Parliament enacted legislation to establish the TRC formally. In taking these constitutionally-mandated steps, government deliberately avoided a "victors' justice" approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill.

3.2.2 The 1993 Constitution and the Promotion of National Unity and Reconciliation Act, 1995, which established the TRC, was based on a conscious agreement by all political parties in South Africa to avoid Nuremberg-style apartheid trials and any ensuing litigation.

3.2.3 The TRC completed its work in March 2003. It granted amnesty to many perpetrators of gross violations of human rights on a cross-party basis. It also recommended financial reparations for some 20 000 victims of such abuses. In his address to Parliament on 15 April, 2003, on the tabling of the TRC Report,

President Thabo Mbeki on behalf of the government, observed that:

> **"In the recent past, the issue of litigation and civil suits against corporations that benefited from the apartheid system has sharply arisen. In this regard, we wish to reiterate that the South African Government is not and will not be party to such litigation.**
>
> **In addition, we consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation".**

3.2.4 It is my respectful submission that the government's views on matters which fall within its sovereign domain should be respected in all forums.

3.3 I believe that it is important for the court to understand the context in which these cases are brought. The litigation appears to suggest that the government of which I am a member, has done little or nothing about redressing the ravages of the apartheid system, which, while formally and institutionally terminated by the election of the Mandela government on 27 April 1994, continue to live with us and will, unfortunately, continue to endure for many years to come. It likewise fails to appreciate the

mandate under which South Africa's first democratic government was elected and how it has gone about executing this mandate since 1994. In order to assist the court, I set out briefly the details of this below.

4. In addition to institutionalising enforced racial segregation, and denying the majority the franchise, the apartheid system sought systematically to exclude most South Africans from access to adequate education, health care, housing, water, electricity, land and communications, while likewise excluding it from proper participation in the economy. The African National Congress-led government, under the leadership of former President Mandela, was elected in 1994 by the previously apartheid-excluded majority on a programme specifically to redress the legacy of apartheid. The government's programme, based on the reconstruction and development of the South African economy, accordingly had and continues to have as its central plank the fundamental transformation of South African society. It does so by attempting to rehabilitate the lives of the previously disadvantaged through the promotion of non-racialism, equality and social justice. The implementation of this policy, as will be seen below, has been and continues to be achieved through wide-ranging legislative reforms to transform South African society. In other words, what the government is attempting to do is to repair the damage caused by the apartheid system through a broad programme of socioeconomic reparations which has at its heart, the betterment of the lives of the previously disadvantaged.

5.

5.1 South Africa's 1996 Constitution, which the African National Congress was instrumental in

drafting, gives effect to government policy to redress the wrongs of the apartheid system, by not only prohibiting all forms of discrimination, but also by guaranteeing the right of all South Africans to access to housing, education, health care and related social services. Under the Constitution, the government is obliged to meet these socio-economic rights within the limits of its resources. The central importance of these provisions of the Constitution is, however, transformative and redistributive, in order to enable all South Africans to overcome the legacy of apartheid, through the creation of a more just and egalitarian society. Although, the government has obviously not met all of its 1994 goals, its record, faced with the realities of a globalised economy is, I submit, impressive.

5.2 In education, the spending disparity on white and black learners (18:1 in 1970 was reduced to 3:1 by 1993) was eliminated by racially integrating schools while at the same time, directing the bulk of state expenditure to the neediest schools. In addition, free primary and secondary level education will be available to the poorest 40% of the population from 2004. Government remains committed to reducing adult illiteracy.

5.3 Skewed land ownership is being addressed through legislation which provides for the restitution of land taken from black South Africans under race-based legislation first introduced in 1913. Further laws provide for the redistribution, with state assistance, of some 30% of commercial farming land to emerging black farmers.

5.4 Social pensions (equalised prior to 1994) have now been extended to many more beneficiaries and supplemented by school feeding schemes, free medi-

cal treatment at state hospitals for pregnant women and children under the age of six, and a child support grant. Substantial increases have been made in providing state financial support, especially to children, with more than eight million people expected to receive social assistance grants by 2005 compared with 2.7 million in 1997. Government is currently rolling out state financial support for children between the ages of seven and fourteen years, over a seven year period.

5.5 At the same time, government has adopted a range of legislative measures aimed at overcoming racial inequality, including the Employment Equity Act of 1998, and the Preferential Procurement Policy Framework Act of 2000. The vast bulk of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, came into effect on 16 June, 2003.

5.6 A good example of achieving majority participation in the economy is the Minerals and Petroleum Resources Development Act of 2002, which is due to come into force in late 2003. This vests all mineral rights in the state and grants new mining licences to applicants in return, among other things, for comprehensive endeavours to promote black economic empowerment. The objectives here include the transfer of ownership to black South Africans of at least 26% of equity or operating assets within ten years under a broad-based mining charter agreed with the South African mining industry. Likewise, a Black Economic Empowerment Bill, intended to promote black economic empowerment in other sectors through measures such as affirmative action, preferential procurement, and equity transfers in favour of black South Africans, is currently before the South African Parliament.

6. While the government's job is to govern in a way which is best for the people as a whole, it cannot ignore the fact that it is the successor government to the apartheid government and, as such, bears primary responsibility for the rehabilitation and improvement of the lives of the people whom the claimants claim to represent.

7. The decision taken by Cabinet not to support the litigation was not taken lightly. The Cabinet only took this decision after an extensive discussion both at Cabinet committee level and in the full Cabinet in which I participated fully. The principal reason for the Cabinet's decision was that as the Mandela government in 1994 and the Mbeki government in 1999 were both elected by an overwhelming majority of the population, on a programme of thorough socio-economic transformation aimed at redressing the legacy of apartheid, it would make little sense for the government to support litigation, which not only sought to impose liability and damages on corporate South Africa but which, in effect, sought to set up the claimants as a surrogate government. Accordingly, on 16 April 2003, the Cabinet, after extensive discussion of the matter at Cabinet committee level, resolved that:

> **"It remains the right of the government to define and finalise issues of reparations, both nationally and internationally. In this regard, it is imperative for the government to clearly express its views on attempts to undermine South African sovereignty through actions such as the reparations lawsuit filed in the**

**United States of America by a US lawyer, Mr Ed Fagan, against two South African mining firms and the participation of South African lawyers in such procedures."**

8.

8.1 The government's policy is to promote reconciliation with and business investment by all firms, South African and foreign, and we regard these lawsuits as inconsistent with that goal. Government's policies of reconstruction and development have largely depended on forging constructive business partnerships. Its 1996 Growth, Employment and Redistribution ("Gear") strategy further acknowledged the importance of the private sector that faster economic growth offers the only way out of poverty, inequality, and unemployment, that such growth is driven by both foreign and local private sector investment, and that government's principal role is to create an enabling environment for such investment. This market-friendly strategy regards business as the engine of economic growth.

8.2 The re-entry of South Africa to global capital and export markets post-1994, together with the government's exemplary fiscal and monetary policy record, have resulted in an increase in economic growth to 2.5% per annum from 1994-2002, compared with the paltry below 1 per cent per annum growth of the previous decade. Importantly, private sector fixed investment has responded to the improved environment, rising some 4.3 per cent per annum since 1993.

8.3 The improved growth performance is still less than what is required to address successfully all the

socio-economic legacies of apartheid — especially unemployment. But, together with the government's redirection of existing expenditure, it has enabled important progress to be made in addressing historical inequalities and poverty.

8.4 In addition to the government performance set out in 5, the recently released 2001 census, together with figures from the South African Reserve Bank, provide evidence of further important progress:

- real disposable income per capita of households (at constant 1995 prices) rose from R8 640 in 1994 to R9 271 in 2002, reflecting an increase of 7.3%;
- from April 1994 to February 2003, close on 1.5 million houses had either been built or were under construction with the help of the government's subsidy for low-income first-time buyers. The number of formal dwellings increased from 4.3 million in 1996 to 6.2 million in 2001, an increase of 44%. Further, formal houses constituted 48% of the total number of dwellings in 1996 and this proportion rose to 56% in 2001;
- the number of households using electricity for lighting increased from 5.2 million in 1995 to 7.8 million in 2001, an increase of 50%. While 57% of all households used electricity for lighting in 1996, this proportion had risen to 70% by 2001;
- the number of households with access to clean water increased from 7.2 million in 1996 to 9.5 million in 2001, an increase of 31%. As a result, by 2001 85% of all South

African households had access to piped water within 200 metres of their homes;

- in 1996, the number of people aged between 5 and 24 who were studying at an educational institution was 11.8 million while in 2001 the number had risen to 13.7 million: an increase of 16%. The number of people aged 20 or over who have Grade 12 or have completed high school rose from 3.5 million in 1996 to 5.2 million in 2001, an increase of 50%.

9. The government accepts that corporate South Africa is already making a meaningful contribution to the broad national goal of rehabilitating the lives of those affected by apartheid. Over and above its existing corporate social investment programmes, business has been in partnership with the government in the R1-billion (approximately US $ 133-million) Business Trust. Over five years, this business led initiative has improved the lives of 2.5 million disadvantaged South Africans through focused programmes of human capacity building and employment creation. Further initiatives in partnership between business and government, as well as other social actors, are being prepared with concrete commitments having been made in a number of fields at the government's June 7, 2003 Growth and Development Summit attended by leading representatives of government, business and labour. At this summit, business agreed with government and labour to invest R145 billion (US $19 billion) in the automotive, chemical, mining and oil sectors over the next five years.

10. The remedies demanded in the current litigation in the United States —both the specific requests (such as for the creation of a historical commission

and the institution of affirmative action programmes) and the demand for billions of dollars in damages to be distributed by the US courts — are inconsistent with South Africa's approach to achieving its long term goals. In this regard, I refer further to the earlier discussion on the TRC and its establishment in 3.2. As indicated above, the government has its own views on appropriate reparations policies and the appropriate allocation of resources to develop our economy. I would also make the point that matters of domestic policy which are pre-eminently South African should not be pre-empted by litigation in a foreign court.

11. It is also the view of the government that the issues raised in these proceedings are essentially political in nature. These should be and are being resolved through South Africa's own democratic processes. Another country's courts should not determine how ongoing political processes in South Africa should be resolved, not least when these issues must be dealt with in South Africa. In addition, the continuation of these proceedings, which inevitably will include massive demands for documents and testimony from South Africans involved in various sides of the negotiated peace that ended apartheid, will intrude upon and disrupt our own efforts to achieve reconciliation and reconstruction.

12. Permitting this litigation to go forward will, in the government's view, discourage much-needed direct foreign investment in South Africa and thus delay the achievement of our central goals. Indeed, the litigation could have a destabilising effect on the South African economy as investment is not only a driver of growth, but also of employment. One of the structural features of the South African economy,

and one of the terrible legacies of apartheid, is its high level of unemployment and its by-product, crime. Foreign direct investment is essential to address both these issues. If this litigation proceeds, far from promoting economic growth and employment and thus advantaging the previously disadvantaged, the litigation, by deterring foreign direct investment and undermining economic stability will do exactly the opposite of what it ostensibly sets out to do.

13. I understand that under United States law, courts may abstain from adjudicating cases in deference to the sovereign rights of foreign countries to legislate, adjudicate and otherwise resolve domestic issues without outside interference, particularly where the relevant government has expressed opposition to the actions proceeding in the United States, and where adjudication in the United States would interfere with the foreign sovereign's efforts to address matters in which it has the predominant interest. The government submits that its interest in addressing its apartheid past presents just such a situation.

[Sworn to by then Minister Penuell Mpapa Maduna, July 11, 2003]

In conclusion, I wish to state that in the view of the South African Government, the decision of the District Court dismissing these litigations was correct.

October 13, 2005
Pretoria, South Africa

Brigitte Sylvia Mabandla
Minister of Justice and
Constitutional
Development of the Republic of South Africa

## APPENDIX F

## MINISTRY
## JUSTICE AND CONSTITUTIONAL DEVELOPMENT
## REPUBLIC OF SOUTH AFRICA

## MEDIA STATEMENT

### Apartheid Lawsuit – US court of appeal decision

### 19 October 2007

The Minister for Justice and Constitutional Development, Ms Brigitte Mabandla, MP, has noted the decision of the New York Circuit Court of Appeal to reverse the finding of the district court on the Alien Tort Act Claim. The Alien Tort Claims Act allows foreign victims of serious human rights abuse by multi-nationals to sue the perpetrators in U.S. courts.

Minister Mabandla wants to reiterate that the government's consistent position on the matter, as captured in the Maduna Declaration of July 2003, is essentially of a political nature. The government is of the view that the case is directly related to the sovereignty of the South African state and should be resolved through South Africa's own democratic processes. "We submit that another country's courts should not determine how ongoing political processes in South Africa should be resolved," Minister Mabandla said in her declaration filed in the New York court.

Like her predecessor, Dr Penuell Maduna, the Minister maintains that "the responsibility to address the country's apartheid past, the development of policies addressing this past and the rehabilitation

and improvement of the lives of the people of South Africa lies with the South African government and not foreign courts."

**Contact:**
**Mr Zolile Nqayi**
**Spokesperson: Ministry of Justice and Constitutional Development**
**Tel: (021) 467 1714**
**Cell: 082 898 6483**
**Fax: (021) 467 1732**
**E-mail: znqayi@justice.gov.za**

**Issued by: Ministry: Justice and Constitutional Development**
**19 October 2007**

## APPENDIX G[1]

## UNREVISED HANSARD
## NATIONAL ASSEMBLY

**Thursday, 8 November 2007 Take: 21**

**Question 21**

**MR L M GREEN (FD) TO ASK THE PRESIDENT OF THE REPUBLIC:**

Whether the Government will assist the victims of apartheid who were recently given permission by the US Appellate Court to proceed with a class action against 23 multinational corporations that supported the apartheid government; if not, why not; if so, what are the relevant details?

**THE PRESIDENT OF THE REPUBLIC:**

Madam Speaker, when a class-action suit was instituted in 2003 against multinational corporations that had not disinvested from South Africa during the years of apartheid and others that had dealt with the apartment regime, government stated that it would not be party to such litigation then and in the future.

When government presented, for the attention of Parliament, its response to the recommendations of the TRC in April 2003, we stated that it was completely unacceptable that matters that were central to the future of our country should be adjudicated upon in foreign courts which bore no responsibility for the wellbeing of our country and the observance

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[1] This is the official verbatim record of the proceedings of the National Assembly of the Republic of South Africa.

of the perspective contained in our Constitution on the promotion of national reconciliation.

Now, with regard to the particular matter that the hon member refers to – this decision taken by the US Appellate Court – when that decision was handed down, there was a dissenting judge, Judge Korman. Judge Korman eloquently explained why the case should be dismissed based on deference to the views of the governments of the United States and South Africa as to the effect of these cases on US international relations and particularly because these matters should properly be addressed within South Africa's political and legal processes.

According to Judge Korman, and I quote: "A decision to hear these cases would reflect the worst sort of judicial imperialism ... and send the message that the United States does not respect the ability of South African society to administer justice by implying that US courts are better placed to judge the pace and degree of South Africa's national reconciliation."

We took the same position, knowing full well the appalling ravages of colonialism and apartheid. Our stance is primarily informed by a desire to ensure that as South Africans we remain fully responsible for our own programmes to rebuild our country.

We appreciate that our people understood and accepted that what reparations were disbursed consequent to the recommendations of the TRC, could only be symbolic as they could never comprehensively and adequately recompense any single person.

The impact of white-minority domination, implemented so systematically and thoroughly over many years and throughout our country, spanning virtually every facet of our lives, affected virtually all

black people, and in various respects some individuals from the white community.

The freedom and democracy that we attained in 1994, therefore, represent the most fitting and profound reparation for those of us fortunate to have survived the nightmare. Freedom and democracy and the programmes of social reconstruction and development constitute the most comprehensive response to the crime of apartheid.

We also, of course, do recognise that individuals and communities affected by specific acts of gross human rights violations deserve specific reparations. This is precisely what the TRC process sought to achieve – and much more still needs to be done to ensure that its recommendations, as accepted by government and by Parliament, are indeed implemented.

The variety of programmes in this regard includes individual reparations in respect of which the overwhelming majority of individuals identified by the TRC, and/or their relatives, have been traced. Efforts are still under way to identify the rest of the TRC-designated "victims". The programmes include assistance in areas of education, health, housing and other services; and, while joint and individual projects are being implemented by various departments, our programmes in this regard may indeed need to be improved. There are also community reparations, and we are working with the business community for them to make a contribution to the programmes that government is implementing in the selected nodes. With regard to monuments and name changes, hon members would be familiar with work being done in this area.

As government, of course, we also recognise the right of individuals or communities to pursue their specific grievances through the courts, within and outside South Africa. However, for reasons that we have advanced, government has not in the past, and does not in future, intend to form part of such class actions.

Indeed, we would wish to call on the business community in our country, both domestic and foreign, to work with us to implement the programmes of reconstruction and development, as well as the specific projects proposed by the TRC, the better to ensure comprehensive redress arising from the consequences of the apartheid years. Thank you very much, Madam Speaker. [Applause.]

**MR L M GREEN:**

Madam Speaker, Mr President, thank you for your response. I can understand why the US government should come to the defence of multinational companies, because most of these multinational companies are based in America and, of course, the US benefits the most from these companies. But I actually fail to understand why our own government, which has been elected by the majority of the people who are victims of apartheid and who are bearing the brunt of the legacy of apartheid, should come to the defence of these multinationals in a US court at the expense of our own people. These multinationals have the best legal resources because they can afford them and they do not need our government to defend them.

It is improper and morally inexcusable for our government to prop up the defence of these multinationals that aided and abetted the apartheid regime

and which had the opportunity to make full disclosure before the TRC in order to receive amnesty. Now, the opportunity being lost and given, the fact that the US Appellate Court has ruled in favour of Khulumani, my question to the President is: Does our government have any intention to further support these multinationals in court at the expense of the victims of apartheid when Khulumani argues the merits of the case, and what progress has been made with the disaster-relief fund to assist these victims in terms of the TRC Act of 1995? Thank you.

**THE PRESIDENT OF THE REPUBLIC:**

Madam Speaker, it is clear that the hon Green and myself have been following different cases - no truly, because he is talking about the South African government supporting multinationals, acting in a US court in defence of the multinationals. The South African government has done no such thing at all. Now, I don't know where he gets this from. That is why I am saying that he is following a different case from the one that I'm following. [Applause.]

What we are defending, hon Green, is not multinationals. What we are defending is the sovereign right of the people of South Africa to decide their future. That is what we are defending. [Applause.] We are saying that in terms of all these matters that have to deal with the past, what do we do with the past? How do we change things; how do we deal with reparations – whatever it is that arises from the past?

The best placed people to answer those questions are us, not a judge in a US court. Now, you think it is a judge in a US court that should address that; that's your view. I don't agree. That's why I was quoting

American judge, Judge Korman, who was quite right: "A decision to hear these cases in a US court would reflect the worst sort of judicial imperialism ... and send the message that the United States does not respect the ability of South African society to administer justice by implying that US courts are better placed to judge the pace and degree of South Africa's national reconciliation." Judge Korman is right.

Now, what you are doing, hon Green, is to invite what Judge Korman calls "US judicial imperialism". I can't understand why any South African would want to be brought under such judicial imperialism. Why do you find it attractive? It can't be. [Applause.]

This is a matter that we must resolve, hon Green. If the hon Green and anybody else feel that they are aggrieved about something that happened during the apartheid days, don't take it to New York, bring it to Cape Town. [Applause.] Then we'll deal with it here. Thanks, Madam Speaker.

**DR J T DELPORT:**

Madam Speaker, Mr President, in this instance I rise – and I repeat – I rise to support the President. [Applause.] In fact, I was going to say that I will rise in his defence against the hon Green, but he has so eloquently dealt with Green ... [Laughter.] ... that my defence is superfluous.

However, Mr President, I would like to invite you to comment on two further considerations. The one is that surely we must not support an action which will not found an action in our own law, because I doubt most sincerely that our South African law will allow that type of action.

Secondly, on a matter of practicality and you have alluded to history: where do you draw the line - at

the concentration camps in South Africa? Then, do I have a claim against the Roman Catholic Church for having forced Jacques Delport out of France during the persecution of the Huguenots? You cannot deal with history in that manner, and think that by all sorts of class actions you can come to wipe out what happened in the past. You are fully correct, Mr President, and I invite your comment. So my question is: Do you agree that it lies within our hearts to make the necessary reparations against one another?

**THE PRESIDENT OF THE REPUBLIC:**

This is a good day because I stand here fully in agreement with the hon Delport. [Laughter.] [Applause.] I do indeed, hon Delport, agree. I think with regard to matters of this kind – in my view – the first thing we would need to do is say, "What do we want to achieve?" And we have made this point very, very clear here that we want to achieve national reconciliation. We want to ensure that the past does not continue to dictate our future. Therefore we have to deal with all of these things in a particular way. This is where we want to get to. Indeed, if the Delport family decided to sue the Catholic Church for what they did to Jacques Delport, I would really discourage that, because it wouldn't help us. [Laughter.]

So, the hon Green, who of course I have no doubt at all was speaking honestly in posing this question and arguing in the manner that he did, there does need to be reparation with regard to those that were harmed by apartheid. I am sure that you were speaking honestly and genuinely, and all of us would agree with him.

The question, hon Green, is how best to do that: to achieve that reparation within the context of what

the country has agreed is the direction that we need to take to achieve that national reconciliation. That is the question to ask, and I would agree, hon Delport, you are a lawyer – I'm not – that you are probably right about matters that relate to law, but I think that really in all respects it cannot be that there is somebody outside South Africa who is wiser about what should happen to us as a people and us South Africans – it cannot be. Thanks, Madam Speaker. [Applause.]

**MS C B JOHNSON:**

Thank you, Madam Speaker, and thank you, Mr President. Mr President, flowing from what you have just said about national reconciliation, at the time of the TRC process you said that, and I quote: "there is a need for understanding but not for vengeance; a need for reparation but not for retaliation; a need for ubuntu but not for victimisation".

Now, Mr President, there are people who, flowing from the recent prosecutions in terms of the National Prosecuting Authority – the prosecutions of apartheid-era crimes – that are saying that it would be the interests of national reconciliation to have a second TRC. My question to you, Sir, is what would your comment be on that and do you not think that that would undermine the outcome of the first TRC? Thank you.

**THE PRESIDENT OF THE REPUBLIC:**

No, I wouldn't agree personally, Madam Speaker. Certainly, in government we have not at all discussed any possibility of a second TRC. I think we would have to respect all the circumstances that led all of us to agree to the Truth and Reconciliation Commission, to respect the decisions that were

taken, for instance by the Constitutional Court, with regard to the TRC processes, and so on.

I think it is important that we do that. I do not believe that it would be correct that we have a second TRC. It is true, hon member and Madam Speaker, that there are people – as President of the Republic I have many requests for pardon of people – who are serving jail sentences, having been convicted for what they believe would be the sorts of offences that would have been indemnified in terms of the TRC process.

The hon members would remember that the cut-off date, in terms of the offences that could be considered by the TRC and its amnesty committee, was 10 May 1994. But all of us know very well that the violence that had been afflicting our country did not stop on 10 May 1994 when Nelson Mandela was installed as President of the Republic, and that conflict continued beyond 10 May.

Many of the people who have asked that we should consider pardoning them are people who were involved in actions after 10 May 1994, and, as I say, who then claim that those actions can be defined in the same way as the actions that were considered by the amnesty committee with regard to offences that took place after 10 May. That's what they say.

So there is a challenge: what do we do about that? This is because the practicality of life goes beyond the law. The law said, "these are the cutoff dates and this is what the TRC should do from this date to that date", but the evolution of our country wasn't bound by those processes. So I am only saying, hon member, that there is a problem. I do not believe that it requires a second TRC, but we can't pretend there are

not requests sitting with the President that say, "Can you please deal with this matter?" We have to deal with it and it indeed involves large numbers of people. Quite how we are going to deal with it is a big challenge. Whatever happens with regard to this matter we would certainly have to bring back to Parliament to say together, "What do we do to respond to this challenge?"

The hon Koos van der Merwe once brought a cake into the House to try to sweeten our tongue so that we could respond to a request that he had tabled which concerned this kind of person. We are trying to deal with this matter – we are really reflecting deeply on it – but it is difficult. It's challenging because we do not want, in any way, to undermine or act in a way that would in effect undermine the TRC process. But, certainly, there has been no consideration of the establishment of a second TRC. Thanks, Madam Speaker. [Applause.]

**MRS P DE LILLE:**

Hon President, Madam Speaker, in the whole debate around reconciliation, hon President, I can recall that at one stage we were talking about a community reparation policy. I just want to find out whether we do have such a policy and where we can get hold of it. The Khulumani support group, I think, requested it, from what I read in the papers, from the Department of Justice and Constitutional Development, but it has not been forthcoming. I just want to know whether such a policy does exist. Thank you.

**THE PRESIDENT OF THE REPUBLIC:**

Hon member, as I tried to indicate in my first response to this question, of course the challenge with all of this is that there is no community in our coun-

try that does not require reparation. There isn't any black community in South Africa that would not say, even in the context of what was defined as gross violations of human rights in terms of the TRC Act, that these are the gross human rights violations we suffered – urban and rural. So, what is the response to this?

It is not as though it's possible to say, "Here is what happened at Crossroads; let's do a community reparation programme specific to Crossroads". Then you would need 10 000 of them – each specific to the 10 000 communities that were affected in different ways, but affected nevertheless.

So the response to it, as I was trying to indicate, is that we have to deal as vigorously and in as sustained a manner as possible to the fundamental issue of the legacy of the past. So all of these issues – about development, water and electricity, and roads, and houses, and health, and jobs, and education, and so on – are in reality the only reparation that can go to the people. It is the freedom they got; it's the change in their conditions of life for the better; it's a safer life without crime; and, indeed, I must say, hon De Lille, it's also about the arrest of any such people who did crooked things with regard to the defence acquisition, a subject that is very close to your heart. Let's arrest them and lock them up. That is part of the reparation process. Thanks, Madam Speaker. [Applause.]